United States Court of Appeals for Veterans Claims

THE SIXTH JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Monday and Tuesday
September 18-19, 2000
The Crystal City Sheraton
Alexandria, Virginia

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Update on Section 5904 Fees and EAJA Issues

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September 18, 2000

FIRST PLENARY SESSION

JUDGE GREENE: We are grateful to the Disabled American Veterans color guard from Chapter 10, Arlington-Fairfax, for presentation of the colors. Please be seated.

Good morning, and it is a beautiful morning. Welcome to the United States Court of Appeals for Veterans Claims, Sixth Judicial Conference, Judicial Conference 2000. As you recall from our last conference, Chief Judge Nebeker appointed me as the chairman, and I accepted that graciously as the junior judge, and I promised you that we would meet elsewhere, so I took five trips to Hawaii to find the appropriate setting, but none I found better than this.

So I'd like to thank all of you for attending, and on behalf of the Chief Judge and the judges of the Court, I will convene the conference. This conference has been called under Section 7286 of Title 38, United States Code, to consider the business of the Court and the improvement of the administration of justice within the Court's jurisdiction.

The judges of the Court, members of the Court's bar, and other persons active in the legal profession and veterans affairs being present, this conference is ready to proceed. All of you are very important people. I do have, however, a few individuals I would like to point out who are present with us today, and ask them to stand briefly.

The Honorable Leigh Bradley, General Counsel, Department of Veterans Affairs.

(Applause.)

JUDGE GREENE: Her Deputy General Counsel, John Thompson -- Jack Thompson.

(Applause.)

JUDGE GREENE: I haven't had a chance to see him this morning, but the Chairman of the Board of Veterans' Appeals, Dane Clark.

(Applause.)

JUDGE GREENE: Welcome, Dane. Mr. David Addlestone, Chair of the Court of Appeals for the Veterans Claims Committee on Admissions and Practice.

(Applause.)

JUDGE GREENE: Mike Hannon, Chair of the Court of Appeals for Veterans Claims, Committee on Rules.

(Applause.)

JUDGE GREENE: And, of course, as a junior judge, I would be remiss if I did not introduce my fellow colleagues on the Court, starting with the next junior judge, Jonathan Steinberg.

(Applause.)

JUDGE GREENE: Judge Don Ivers.

(Applause.)

JUDGE GREENE: Judge Ron Holdaway.

(Applause.)

JUDGE GREENE: Judge Jack Farley.

(Applause.)

JUDGE GREENE: Judge Ken Kramer.

(Applause.)

JUDGE GREENE: And certainly not least, Chief Judge Frank Q. Nebeker, who will introduce our very special guest to you this morning.

(Applause.)

CHIEF JUDGE NEBEKER: Thank you, ladies and gentlemen. A veteran, the Chief Justice of

the United States.

(Applause.)

CHIEF JUSTICE REHNQUIST: Thank you, Chief Judge Nebeker, for your kind introduction. I hope you'll forgive me my rather hoarse voice. I'm in the midst of a cold.

It's a pleasure to join you today for the Sixth Judicial Conference and to celebrate the 10th anniversary of the United States Court of Appeals for Veterans Claims.

In October, 1989, I had the honor of presiding over the convocation of this Court, swearing in Judge Farley and Judge Kramer. That event, attended by some 250 lawyers and veterans, took place in the ceremonial courtroom of the United States Courthouse across the river.

There was much enthusiasm that day among the supporters who gathered together for the ceremonies, and I'm very pleased to observe from the vantage point of over a decade now that this enthusiasm was well founded. The Court has not only met, but exceeded the hopeful designs of its creators.

Before the establishment of this Court, veterans whose claims for benefits were denied by the Veterans' Administration were afforded no independent review of these decisions. The Board of Veterans' Appeals provided the final forum at the conclusion of what could be an arduous process.

Many people felt that veterans were being denied the right accorded many other citizens to go to court and challenge similar agency decisions. It's easy to see why the process left many veterans feeling frustrated and powerless.

Legislation subjecting BVA benefits decisions to judicial review was considered by Congress as early as 1952, and the span between the time of first consideration and final enactment simply illustrates the old maxim that "judicial reform is no sport for the short winded."

But the status quo persisted until a crush of post-Vietnam claims in the 1970s and '80s turned the spotlight on a process in need of reform. Individual veterans and several veterans' advocacy groups increasingly pressed for some sort of judicial review. So for the sixth time in the nation's history, Congress established a court of national jurisdiction without geographical limits. It was called at its inception the United States Court of Veterans Appeals.

Since March 1st, 1999, it's been known as the United States Court of Appeals for Veterans Claims. This new court saw immediate action, and in its first five years, over 7,000 appeals were filed. In the second five years, the pace increased with almost 10,000 cases filed.

Even so, since 1995, the Court has actually reduced the average time from filing to disposition while dealing with a significantly greater case load. The Court's work has also changed the way the BVA decides claims.

In the decade prior to this Court's existence, the Board of Veterans' Appeals denied well over 60

percent of claims. In the decade since this Court's creation, the Board has denied fewer than 40 percent of the claims before it.

Far more important than bare statistics, of course, are the lives of the individuals represented in each of those cases. As one writer has recently observed, this Court's work has resulted in veterans being granted benefits "in thousands of claims which would have been denied before judicial review. For many disabled veterans and their families, this has meant the difference between a life with dignity and a life without it."

I commend all those who have been responsible for the remarkable successes of this Court during its first decade. May it continue to fill its promise in the years to come.

Thank you.

(Applause.)

JUDGE GREENE: It is quite a historical event and a pleasure to have the Chief Justice with us today. It's not often that we can celebrate a 10th anniversary three times.

As you recall, the statute created the Court in 1988. The first three judges came on board in 1989, and then all seven judges were brought on board as a full court in August of 1990. Thus, the 10th anniversary again.

So the state of the Court is good, and I now present to you our Chief Judge, who will tell you about that.

(Applause.)

CHIEF JUDGE NEBEKER: Good morning, and welcome to all of you. This, as you were told, is a State of the Court Address that serves both as a hail and a farewell. I'm happy to have the opportunity to greet and to address you. That's the hail part. The farewell part, of course, is that this will be my final State of the Court of Address. As most of you probably know, I'm going to retire from the Court on the 6th of October after having completed over ten years.

I consider it a special and unique privilege to have served as the Chief Judge of the Court for this past, and its first, decade. Particularly, I pay tribute to the Court staff, the finest staff ever to serve a court, and I think we should acknowledge that right now.

(Applause.)

CHIEF JUDGE NEBEKER: I will soon hand over the symbolic gavel to Judge Kenneth B. Kramer, who has escorted the Chief Justice out of the room and out of the building. Ken, I wish you well. You have five wonderful and brilliant colleagues. Treat them and the staff well.

Now, by the way, speaking of my colleagues, I hope that even after I've left, they will continue to operate under our mutual and informal agreement to refrain from using footnotes in opinions.

(Laughter.)

CHIEF JUDGE NEBEKER: We are the second court -- there are only two courts in the United States that refrain from footnotes in the opinions of the Court. Such a practice is appropriate, particularly here where our mission is to apply the rule of law in a way that is clear and understandable to everyone, even those who are not trained in the law.

I remind my colleagues of a story I told them some time ago. You know, a footnote in a judicial opinion is like a knock on your door in the middle of the night on your wedding night. You'll get up and answer it, but it better be damned important.

(Laughter.)

CHIEF JUDGE NEBEKER: Now, let me speak of what the Court has done in getting to our 11th year of operation. We have 13 volumes and we're working on the 14th of precedent opinions. As of July, 2000, there were 17,335 cases decided both on the merits and by dismissals.

The Supreme Court granted certiorari in one case and affirmed. I challenge any other court in United States to that record in ten years.

Based on the present number of notices of appeal -- over 200 a month -- we can expect the Court's future case load to run about 2400 to 2500 cases per year. While the Court's case load is continuing at its relatively high rate, it is important that the Court continue to operate at full strength. I hope that after the incoming President takes office, there will not be a long wait as there has been in the past for an appointment to fill the vacancy created by my retirement.

During the years 2004 and 2005 , the terms of five of the remaining six judges will expire, and that raises the specter of a grave institutional crisis. When I last spoke to you in September of 1998, I brought you up-to-date on bills then pending in Congress that would have permitted early retirement of two associate judges opting by seniority, thus to stagger at least two of the positions.

The legislation then pending was never enacted. The enactment that was adopted proved to be of no help whatsoever. The legislation has not really solved the problem and something must be done or Judge Greene and my successor will be all alone in the Court in mid-September, 2005. And under Title 38, a two-judge court is not provided for. Even a three-judge court would be unable to keep up with the anticipated case load. Our year 2005 problem looms darkly and needs a meaningful response by the Congress and the President.

There's another factor that now make significant contributions to the Court's workload. It's a subject that's dear to the hearts of many of you here. I'm talking about attorneys fees.

Litigation over attorneys fees under contingency contracts and under the Equal Access to Justice Act raises issues that can be highly complex. The litigation expends much of our judicial resources that could otherwise be directed to the merits of claims.

Attorneys do provide valuable assistance to benefits claimants, and I might add, to the Court, and

must -- they must be fairly and timely compensated. Congress has determined that fees, which for a long time, were five and then ten dollars, should be available at a "reasonable level," and that the involvement of attorneys in benefits litigation was beneficial to the claimants. That, I suggest, is evidenced by the statutes that were passed respecting fees for lawyers.

While it is for the political branches to balance the policy interests as to whether to have attorney involvement in earlier stages of benefits litigation, such as the regional office and initial proceedings before the Board, I respectfully submit there should be legislation that would permit attorneys' fees for work at those levels as well. Such legislation would do much to avoid errors and speed the adjudication process, which today is tragically slow and fraught with avoidable error.

Six years ago, I stood before this conference to suggest that a restructuring of the benefits administration for the Department of Veterans Affairs was in order. This suggestion was met with some hostility from within VA, those were favoring the status quo.

Since then, studies by numerous blue ribbon panels have suggested the same need. At this point and speaking anecdotally from the records on appeal that are filed with the Court, it does not appear that much has been done.

I understand that the department is in the process of restructuring the VBA. Like you, I look forward to hearing our lunchtime plenary speaker, Under secretary Joe Thompson, and what he will tell us. It is a formidable task to bring about this restructuring, especially within a department that is in a constant state of transition. I recognize that fact.

We at the Court are still seeing far too many cases where there have been delays lasting for years, resulting from misguided responses to orders of the Board or the Court for medical examinations or opinions. This emphasizes the need for close coordination between the health professionals and the VA adjudicators, with a workable chain of command.

Four years ago, the then-General Counsel of VA spoke at this conference of an ambitious undertaking to rewrite the vast body of benefits regulations. Again, I speak as an outsider as concerns VA's internal workings, but to the world at large, it appears that that comprehensive undertaking unfortunately died with a weak whimper.

For my final point, I saved the most important. It is what I mentioned when I began this address: The very reason why the Court exists and why we're here today.

From its creation, the Court was charged with one duty: To see that the rule of law governed the veterans benefits process. The Court, unlike VA, must be neutral in deciding disputes between applicants and the Secretary. We must apply the law as written. I like to think we have.

Also, even though the Court process is adversarial, it is our task to insure that under the rule of law, the non-adversarial process at VA has been maintained. This duty of neutrality seemed strange and somewhat out of place to some used to the pro-claimant VA process. But nonetheless, it was a process that was commanded by the enactment of the VJRA.

Prior to the creation of the Court, those dealing with VA benefits systems have dealt with the two political branches of government. Commentators on our constitutional system have noted that these two political branches have potent powers and that the judicial branch lacks such power.

Alexander Hamilton in Federalist Paper 78 sought to convince his countrymen that they had nothing to fear from what he called the least dangerous branch. He wrote the following:

"The judiciary, from the nature of its function, will always be the least dangerous to the political rights of the Constitution because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated."

As Hamilton commented, and others have since observed, judges lacked the power of the purse and the power to enforce, yet they serve in a branch of the government that the United States Constitution established to provide the checks and balances essential to our government system.

Federal courts are empowered to tell Congress that legislation is unconstitutional and department secretaries that their acts exceed their authority. Nevertheless, the balance among the branches may appear unequal because the only power base into which the third branch can tap is our citizens and their respect for the rule of law.

In every lawsuit, including those before our Court, one party wins and one party loses. In an article entitled, "Doing the Right Thing and Giving Public Satisfaction," in the fall issue of the Court Review -- that's a journal of the American Judges Association -- our Chief Justice commented on this matter. He said, "Many of the losers will understandably be disappointed and some may feel that they got a raw deal from the Court. But there will always be criticism of particular decisions of courts not only by losing litigants, but by lawyers, laymen, educational commentators, and legal journals which disagree with the doctrine which underlies the particular decision."

He went on to say that this is the price to be paid for an independent judiciary. He said, "Whatever may be the merits or demerits of a public poll-driven executive or a poll-driven legislature, the specter of a poll-driven judiciary is not an appealing one." This Court was created 12 years ago under Article 1 of the Constitution and it is beyond dispute that Congress intended the Court to function as an independent judicial entity.

I close with a suggestion and a reminder: Every so often, I implore you, read all of the Declaration of Independence, not just the preamble, which you probably memorized when you were in school. That Declaration tells you the type of government and court we do not and cannot want.

Note the two counts against King George III, respecting the judiciary. "He has obstructed the administration of justice by refusing his assent to laws establishing judicial powers. He has made judges dependent on his will alone for the tenure of their office and the amount and payment of their salaries. Those were the two counts in the indictment brought against Great Britain that dealt with the judicial function of government which the colonists had been deprived of by the Crown.

Well, we are living in an era when independence of our courts, both state and federal, is being challenged almost daily. These attacks do not just emanate from individuals.

The other branches of government sometimes lead in these coercive attacks, all the way from impeachment, or the like, recall petitions, and so forth, to underfunding.

I'm proud to say that for the 11-plus years of its existence, this Court, through its judges, has with appropriate and unhindered exercise of independence, brought the administration of veterans benefits under the rule of law.

I leave the Court next month with respect for and thanks to my colleagues, judicial and non-judicial, and with confidence that they will carry on in the finest tradition of the judiciary.

Thank you.

(Applause.)

JUDGE GREENE: If you get a chance to shake hands with the Chief today, I think you will get a clue as to what he is planning to do when he retires, if you just look at his tie.

Our next speaker is no stranger to any of you. He is the person that runs the everyday operation of the Court, and so much so that when he says, "Give the person another kick, he took that literally." So he's on crutches today.

I'd like at this time to present to you our Clerk of Court, Bob Comeau.

(Applause.)

MR. COMEAU: Thank you, Judge. Let the record reflect that this is not a service-connected injury, unless 30 years in combat boots gives you bunions, and I did not get run over by a truck. In fact, I volunteered for this process.

There have been a few rules changes since we last met two years ago. First, let me remind you that the current paper version of the Rules, that have changed many times over the years, has a dark green cover. And the current version is also on our website, the address of which is on this little calendar before you.

There is also a copy of the current Rules at Tab 4H of your conference materials.

In May, 1999, Rules 3 and 46 were changed. First, a limited appearance is now available only to a practitioner who is filing a notice of appeal only to prevent the running of the Statute of Limitations. A miscellaneous order also allows the Pro Bono Program, and only the Pro Bono Program, to enter a limited appearance for the purpose of screening a case.

Otherwise, all practitioners must file a notice of appearance in the detail provided in the new Form 3, which is at the back of the Rules. That form requires you to specify your bar status before the

Court, your representational status, because we only contact and require the Secretary to serve the representative of record, and third, the terms of your representation. If you're representing the client for a fee, it requires a copy of your fee agreement up front.

The conditions of withdrawal have been imposed by the Court for some time, and they are now moved into Rule 46 itself. So that should eliminate some of the delay in withdrawing from a case because you know precisely what you have to give us when you do withdraw.

In June of this year, the longstanding prohibition against citing non-precedential materials as precedential, which has been buried -- in an obscure location in Rule 28(i), has been rearranged for clarity and given more prominence in the previously unused Rule 30.

Our Rules Advisory Committee is now reviewing the most recent changes in the Federal Rules of Appellate Procedure to see if any of them should be part of our rules. As you know, our enabling legislation doesn't require us to follow the Federal Rules of Appellate Procedure, and many of those rules are indeed inapplicable to our process.

In addition, the Committee has some other issues under consideration and always welcomes suggestions from the bar. You may send those suggestions to me, and I'll promptly refer them to the Committee.

Now, as has been my custom at these conferences, I would like to give you a statistical picture of the Court's operation this year. Like other Federal courts, we report by fiscal year, and my projections are based on numbers that I have through the end of July.

Annual reports for fiscal years 1995 through '99 are on our website, and the current year's report probably will be posted about mid- November. That's when our numbers stabilize at the end of the year.

I expect that our intake this fiscal year will be about 2460 cases, the highest to date, and an increase of about two and a half percent over last year, when we experienced only a slight increase over the year before.

I expect that we'll terminate 2195 cases, only 77 percent of last year's figure, and as a result, our backlog will increase by 11 percent to about 2240 cases. Moreover, that backlog probably will continue to grow between the Chief Judge's departure and the appointment of a new judge.

The average processing time from case opening to decision has increased from one year, about a year ago, to about 14 months for cases decided in June. That figure also will remain high for the same reason.

Now, as to the manner of termination, I'm pleased to note that last year, the latest for which I have complete figures, only 21 percent of our cases were terminated on procedural grounds, that is predominantly for lack of jurisdiction or default -- failure to follow the rules -- and in some cases, voluntary withdrawal. That's a substantial drop from previous years, and is a credit to those of you who are screening cases early. It's obvious that these cases are being vetted early on. Ones that lack

jurisdiction are not being brought forward, and people are in better hands in terms of following the rules.

Of those cases that went to a decision on the merits, about 61 percent were remanded, in whole or part, a rate that, unfortunately, has remained relatively constant over the years.

The pro se rate for new cases is about 69 percent, only a slight increase from last year. However, the efforts of the private bar, veterans' organizations, and the Pro Bono Program have reduced that rate to 37 percent by the time cases were decided, down substantially from last year, and the lowest rate in the Court's history. Again, congratulations to you all.

Of course, the numbers don't tell the whole story. For the past ten years, I've kept in my office a framed quotation by General Omar Bradley, post-World War II Administrator of Veterans Affairs, and, incidentally, the grandfather of my predecessor, the first Clerk of this Court. That quote serves as my constant reminder that we're dealing with veterans, not numbers, and that their problems are ours.

Now, that doesn't mean that we on the Court staff should tip the scales out of balance, but we should make extra efforts to insure that veterans have meaningful access to justice.

For me, that has meant helping them navigate through an often confusing appellate process by making it more understandable through simplified rules, orders, and notices, and through clear and helpful explanations over the phone, and occasionally, in person. And I'm proud that this vision is shared by the Court's public office staff and central legal staff, so I'm comfortable in leaving this task in their hands when I retire at the end of October after 40 years of Federal service, and reclaim my primary title as "veteran."

I've enjoyed these last ten years. You've made it . . . interesting.

(Laughter.)

MR. COMEAU: Good luck in your work in the challenging world of judicial review. Thanks.

(Applause.)

JUDGE GREENE: Thank you, Bob. Forty years is quite a long time, and we're honored to have had your presence on the Court for ten of those 40 years.

Let's give him another round of applause.

(Applause.)

JUDGE GREENE: Of course, I've had the pleasure of being your colleague in the JAG Corps.

Well, we're going along great on time. No one is here from the Federal Circuit. I think that maybe I had two or three people from their Central Legal Staff. Unfortunately, none of the judges could

attend. However, their impact on our case law is quite evident over the past years, so I'm sure you know they're quite present, and we will have a chance to discuss that this afternoon.

We have breakout sessions this morning and this afternoon, and with that, I've got some administrative announcements that I'll have my clerk, Jamie Mueller, who's also coordinator for the conference, present those at this time.

MS. MUELLER: Good morning. No conference would be complete without some administrative announcements.

Take a look at your binders. Inside the front cover are some items that you're going to need. For those of you that would like CLE credits, and who wouldn't, the forms are in those pockets. You should complete the form and put it in a box at the registration table at the end of the conference tomorrow before you depart. We'll send the forms to the State Bar. Just remember, anything sent to us after the conference is over, we cannot accept.

If you have any questions or if your state has some unusual requirements -- I understand Texas, Florida, and Minnesota are such states -- please see Mr. John Nichols. He's our CLE Coordinator. John, could you stand up, please? He'll take care of you if you have any questions or problems concerning CLE's. If you want CLE credits in more than one state, you'll have to fill out a form for each state. And, as I said before, please submit them before you leave.

As is becoming more common, there is no smoking allowed in the meeting rooms or in the ballroom. I understand the only place within the hotel that there is smoking is at the bar -- or you could go outside, of course.

And I'd also like to mention that we really do want your feedback on the conference. Inside that front panel are also some evaluation forms that you can turn in. There's one for each day.

If you need to be reached in emergency, the hotel number here is 703-769-3942. Let me give it again. 703-769-3942. The hotel staff will get to one of our staff members, and there's a bulletin board outside by the registration desk.

If you have any calls of your own to make, there are some pay phones located at the end of the meeting rooms, and there are some downstairs near the lobby.

I'd like to thank all those people who sent in questions for our session, Application and Enforcement of the Court's Procedural Rules. That will be one of our plenary sessions. But for those of you that were working overtime and sent some questions that had nothing to do with that, but had to do with other things, we forwarded those questions to the appropriate panel. If you don't happen to be in the panel where your question is addressed, I'd like to remind you that transcripts will be made and should be available in an upcoming Vet. App. Reporter. So you can consult that to see if your question was actually answered.

The concurrent panels don't begin until 10:30, which means there's plenty of mingling time until then. But we'd like to start the lunch session precisely at noon, so please wander back in a little

before noon and be seated so we could start on time.

The meeting rooms for the conferences are found at Tab 1 in your binder, and they're at the end of the hall. When you walk out, you go to your left. And we'll be starting those at 10:30.

Thank you.

JUDGE GREENE: Now, as you see, you've got mingle time. Because of all the oral arguments we have, I'm sure you'll get a chance to talk to the judges and shake the judges' hands. That will give us the time to do that. It will also give us time to meet each other and discuss some issues before the seminars begin.

So mingle. Be sure to be on time for the seminars, and we'll see you back here at lunchtime.

Morning Breakout Sessions

COMPENSATION & PENSION EXAMINATIONS: EXPERT TESTIMONY OR PHYSICAL ASSESSMENT?

Hosted by Mr. Richard Bednar

MR. BEDNAR: We're going to go ahead and begin a few minutes early, and you'll be out a few minutes early and ready for lunch.

Welcome to the first breakout session on C&P Examinations, Expert Testimony or Physical Assessments. On behalf of the Court, we'd like to welcome you. My name is Richard Bednar. I'm a staff attorney with the Court's Central Legal Staff.

Let me make one or two announcements before I introduce Dr. Coulson. At the end of his presentation, there will be a question and answer session. This session is being recorded and will be printed in the Court's Reporter. So when you ask a question, if you would please, introduce yourself, and if necessary, spell your last name so it's reported properly.

Let me introduce Dr. Coulson. He's well qualified to speak to us today on the subject at hand. He has notably developed a teaching program to educate physicians in the proper administration of recording the C&P exams in order to improve the timeliness and sufficiency of exams.

He graduated from the University of Illinois' College of Medicine in 1973. He has served both as the Assistant Chief of Medicine and the Associate Chief of Staff for Ambulatory Care at the University of Illinois and the West Side Veterans Hospital. He is himself a veteran.

Would you please welcome Dr. Coulson.

(Applause.)

DR. COULSON: Good morning. Can you hear me without the microphone?

I have a tendency to move around a little bit, and without a microphone, it will make it a little bit easier.

Let's set the stage for what I would like to talk about today.

There are two types of physicians that many of you know are involved in the veterans process. One is what I call the "veterans advocate physician," a typical doctor that takes care of the veteran.

And that doctor does two things: One, examines his opinion. But, of course, because they represent the veteran, are often biased toward the veteran. And those are the ones that will help you get your claim well-grounded. Now, that could be a private doctor or a VA doctor.

The second type of doctor we're going to talk about today, and that is the doctor that's designated to actually give an unbiased opinion about the information in the C file and examine the veteran, and may act as an expert witness in a court of law.

And what we're going to talk about today is my program that I started in Chicago and the problems with it, and what we've done to change it around, which will give us some ground for discussion later.

Up until about five years ago, compensation or pension physicians in Chicago were indeed examining veterans, answering questions. But then they were getting things back from the RO saying, "These cases are insufficient or inadequate for any purposes."

And my doctors, of course, being doctors, said, "Well, what do you know about doctoring," right? "I'm the doctor. I write good opinions. I do good cases, and nobody challenges me in the arena of the university or a treatment, so why do you rating specialists keep saying some facts are insufficient?"

And immediately looked at the problem. We made some changes, and now our cases seem to be more sufficient and more adequate, according to the RO's schedule and their opinions.

So let me demonstrate a little bit about what we just talked about. Now, let's think of this as an exam, and the doctor is asked to read the C file, which by the way, sometimes takes 20 minutes, an hour, two or three hours, depending on the size and the number of volumes, to read what the RO has asked for, read what the BVA remand has asked for, perform a history and a physical and, of course, give an opinion.

And in the past when this was sent to the RO, the RO would look at it and say, "What is this? You know, here is an opinion, but it doesn't go with the history. It doesn't go with the physical. It doesn't answer the questions that we asked."

So they send it back saying, "insufficient." So we sat down and we did a training program, and we talked to the doctors about how doctors think versus how lawyers think. And in one setting, you

use legalese. In the other, you use medicalese, right?

And we then took the doctors and we said, "Now, we're going to do the very same thing. We're going to put you back into those cases again and see what happens."

And our brain specialist, they worked with us. They looked. They did whatever they usually do, and said, "Whoa. Now, you're coming up with different types of cases. These are" --

(Laughter.)

DR. COULSON: "These are understandable" --

(Laughter.)

DR. COULSON: -- "and we like them."

(Applause.)

DR. COULSON: I got some for you who didn't get one.

So let's talk a little bit about what it is that we did.

Could someone turn off that one light right on the wall there that turns off most of the lights. I'm going to show you a little training program that we give to our physicians.

The first thing we did was say, "Doctors, let's sit down and let's decide how a doctor thinks." And when we figure that out, next we'll figure out how the RO thinks.

We doctors all go through medical school. Four years in medical school, a year of internship, three years of residency, four years of fellowship, and even four years of advanced fellowship. So we're all pretty old by the time we get out and start actually taking care of patients.

The most important thing that we learn in medicine is to develop a physician-patient relationship. Now, this is the typical physician-patient relationship in which we act as the advocate for the patient, very much like a private lawyer would act as an advocate for their client. We look at things objectively, but we're always biased toward our client because that's who's paying our bill.

The second is that we are trained to use the scientific principle, and we'll go through that for those of you who don't know the scientific principle.

The first thing that any scientist does is have a hypothesis. "What could possibly be the problem?"

Second, you go out to gather data to find out if that really is, indeed, the problem or it is not the problem.

You then discuss all the data that has come in. You develop a plan, and you finally make a

conclusion. This is exactly what any scientist, whether they're a astronomer, a chemist, an engineer or a physician, does in a scientific principle.

Now, if we apply that to medicine, a hypothesis we call a differential diagnosis. What are the possibilities?

Mr. Jones comes to me this morning, and Mr. Jones says, "Doc, I just developed this terrible chest pain about two hours ago," and I know that Mr. Jones is 65 years old and he had a heart attack three years ago. What are the possibilities?

Well, he could have had another heart attack. He could have strained himself. He could have been shot in the chest and be bleeding to death. He could have a tumor. He could have a pneumonia. I'm going to have to ask some more questions to gather some data to decide which of these things it is.

If we move this a little bit, maybe we'll do some things on the screen to help. I guess we can. All right.

The history of the physical is what doctors do to gather data. A history is asking the patient questions.

Now, a history I can take in the room with a patient. I can take a history over the telephone, over the Internet, via letter, because a history is the patient's interpretation of what's going on.

The patient says, "I have pain in my chest." "I fell down." "I had a heart attack before." These are things that the patient tells me so I do not have to be in the room for that, and the things that the patient tells me are called "symptoms."

The other part is a physical examination, which I do. A physical is things that the doctor observes. You can't do a physical over the phone, through the Internet, through letters. You have to actually be in the room because it's looking, it's feeling, it's seeing reactions. And the things that I find in the physical are called "signs."

Now, some things could be symptoms and signs, but some things are one or the other. If the patient says, "Doc, I have pain in my chest," that's a symptom. I can't say, "Oh, no, you don't have pain in your chest." I don't have a pain meter. I can't read the patient's mind. So pain is something that is only a symptom.

Now, the patient could also say, "I had my left leg amputated below the knee in the War," and I can look and see, yes, the knee is amputated. So that could be both a symptom and a sign. He says, "I have an amputation," and a sign, I see an amputation.

After getting all this from the patient we just talked about with the chest pain, I say to the patient, "Now, what happened two hours ago when you say this pain started?"

And he says, "I was lifting a heavy box of books in my basement, and I was carrying them up the

basement steps. And about four steps up, I stumbled. I fell and the books came tumbling down on me."

That little bit of information is changing right now my differential diagnosis. Initially, I had heart attack as the number one possibility. Now, I may push up muscle strain or injury as a higher possibility, okay?

I'm going to update my differential diagnosis now based on what I found, and I found the patient also has tenderness in the chest, okay. And I might say I think the number one differential diagnosis now is acute pain due to injury from falling and having books fall on him.

Number two, it could still be a heart attack because there is a history of heart attack in the past.

I don't see any evidence of gunshot wound, so I'm going to put that way, way, way down at the bottom.

Tumor is always possible, and my plan is to do things to help me to decide is it more likely than not to be a heart attack or deep muscle injury. So my plan would be to do some lab tests, maybe a chest x-ray. Maybe electrocardiogram. I might even want to get a consult to have him see one of our cardiology specialists.

And what I find is that on the chest x-ray, I see two ribs broken. The electrocardiogram is perfectly normal, okay.

Now, my conclusion is to do a diagnosis, which is to update my differential diagnosis. Now, number one is chest pain due to trauma, due to fractured ribs. So it's actually fractured ribs, okay?

So this is the way doctors think. In the past, doctors have written cases like this for the regional office and they've come back. They've come back because the doctor has thought like a doctor and not like an expert witness in a court of law.

So now let's look at what it is that the regional office wants from us doctors. So for compensation and pension, I tell my doctors, "Think of yourself not as a typical treating doctor today. Think of yourself as an expert witness, sitting in a court of law, answering specific questions asked by a lawyer.

"You may not understand the question completely. You can always ask more information. You may not like the question. You may not have phrased the question that way, but you're supposed to answer the question the way it's posed, not change the question around to meet your own needs."

Actually, our doctors, when they got a question from the regional office in the past, would say to themselves, "This isn't a medical question." They actually would rephrase it in medical terms, answer that newly phrased question, which, of course, was answering the wrong question, so the answer was wrong.

So now we teach our doctors the definitions: Compensation. It's really our benefits given to

veterans who have an injury or an illness the VA recognizes as being related to their medical military service. Doctors have to know what it is that we're talking about.

A pension is benefits given to veterans who are disabled and unemployable due to conditions that may not be related to their medical military service.

What's a compensation and pension examination? It is an examination ordered by the regional office to determine the existence or status of a medical condition or conditions for rating purposes. And I have to tell my doctors this is for rating purposes. This examination is not for treating purposes because we would write two different types of exams.

If we're talking about this chest pain and the question was, "Is the veteran's chest pain today due to a Jeep injury he had in 1943 in World War II," the opinion would have to be it is not, at least as likely as not, because he didn't have it yesterday. He's had it following a fall down the stairs today.

But that doesn't change the diagnosis, which is still fractured ribs. So in the old days, my doctors would give a diagnosis of fractured ribs, and that wouldn't be sufficient. But now, it's fractured ribs, is it or is it not? At least as likely it's not that it's related to a specific incidence.

Now, the request form, the 2507, is the request form that the RO sends to us, asking for a specific exam. And it contains the demographics, who the patient is, telephone number, address, how to get hold of them.

The priority of the exam, whether or not it's an original, an increase, a review, pension, or being a remand, the selected exams, the type of exams requested, a joint exam, a mental exam, a PTSD exam.

The current rate of disabilities, and finally, the general remarks, which is probably the most important part of the entire request. It gives the doctors specific information about what the rating specialists need to rate this case.

And if this is a BVA remand, generally we put down very specific things that are needed. "An opinion, doctor, on the following:"

The claims folder, large, cumbersome to a doctor, sometimes measured in inches or feet. We tell the doctors, "The claims folder is made up of three sections, but it's the center section that you're interested in."

It contains the service medical records, and usually in a manila envelope. The previous C&P examinations that the patient has had in the past, any private physician reports, or even physician statements. And, finally, if it's a BVA remand, the actual remand itself is in there.

We have exam worksheets. Each type of examination has a specific worksheet which explains how to perform that examination and what tests to order.

Actually, in order to write these worksheets, we have written these worksheets over a period of

years by looking at the rating book and trying to interpret the rating book into medical terms that the doctor will understand. "Please do this. Please answer these questions because these are specific questions in the rating book that will determine whether or not the patient gets a 10 percent or 20 percent or 30 percent."

If the examiner, for some reason, believes that a test or procedure is medically contraindicated, even though it's on the worksheet or it's in the 2507 request, the examiner must document a rationale in the report for why they did not order it.

A good example would be a chest x-ray on a female who's pregnant at the moment. We certainly would not get a chest x-ray on someone who's pregnant, but we would want to state at the bottom, "We did not order a chest x-ray because the veteran is pregnant at the present time."

So we don't just not order it. We don't order and we give a rationale for why that is.

Types of examinations. Again, these are not types of examinations that we learned in medical school. These are exams that are very specific to the claims process.

An original claim, the background. The veteran is claiming a condition that he or she believes are related to the military service.

This is the first time the veteran has applied for these conditions, and, "Doctor, what we want you to do is take a detailed history of the claimed condition or conditions from its origin until today."

Now, the origin could be in the military service. In 1943, the patient was in a Jeep accident. Was thrown out. Had a crush injury of his left shoulder. It was dislocated. He was seen, and so on.

Or it could say the veteran had a dislocated shoulder prior to military service, and the Jeep injury worsened it because, at that time, it was redislocated. So we go back to whenever this disease first started and give the chronology right up to the present.

An increase claim is actually the veteran is already receiving a rating for the condition, and in this instance, the veteran believes the condition or conditions have increased in severity. The veteran is asking for a review because the veteran thinks things have gotten worse and the veteran actually is wanting more compensation.

In this case, we tell doctors to take a detailed history of the claim condition from the date of the last C&P exam until today.

Now, remember, in the original, we had the documentation from the onset of the injury, up until that exam. Now, this is from that exam up until now.

What has happened? Is it getting worse? What can you do? What can't he do? What can't she do?

And, also, include whether veteran goes for care because the RO should know private doctors are

treating the veteran so they can go and get information from that source.

Now, a review claim, we tell our doctors, again, the veteran has received a rating for the condition, but in this instance, it's not the veteran asking for a new exam; it's the VA is requesting an evaluation to see if the condition has changed.

Really, what they want to know is, has it gotten better, right, so they can decrease the percentage, but, of course, it could have gotten worse. But, again, this is the VA asking for something. The other is the veteran asking for something.

But we treat it the same way. We still take a detailed history of the claim condition from the date of the last C&P exam until today.

What has happened? Have things gotten better, stayed the same, gotten worse? Any complications? And, again, we should say where the veteran goes for other care.

A non-service-connected pension. In this case, the veteran is claiming he or she can no longer work due to injuries and/or condition or conditions, which would mean not related to the military service. And in this case, we take a detailed history of all the claimed conditions.

Finally, the Board of Veterans' Appeals, the BVA remand, which is probably the thing that bothers my doctors most because they already know that this veteran has appealed the case and it's in the legal process.

This veteran has appealed the ruling made by the regional office. The Board of Veterans' Appeals in Washington has sent or remanded -- I just didn't know what the word, "remand" meant -- remanded back to obtain very specific information.

For the most part, a BVA remand is asking for one or two or three specific things that my doctors need to answer. They're not asking for a global group of things. What is it specifically? And, usually -- I don't know who's here from BVA. I think BVA remands are written very clearly for doctors to understand. It's right there. It says exactly -- and I usually even quote what the law says -- and it specifically -- what the doctors should say, and they generally even give them choices of phrases to use, all right?

Now, my doctors in the past didn't like the choices of phrases, so they made it their own. They don't do that anymore.

Review the claims folder and the remand instructions before seeing the veteran. Very important for two reasons: One, for legal documentation. But, number two, it's so nice when the veteran comes in for you to have that great big C file sitting on the desk and say, "Good morning, Mr. Jones. I'm Dr. Coulson. I've reviewed your military records here. I've reviewed your old C&P exams. I have reviewed the ratings that you got from the RO, and I've reviewed the BVA remand," so they think that you're not starting this examination cold and you have some facts. And all of the facts that are in their record now make them feel that they are really important to them.

Restate in the dictation, "I have reviewed the claims folder and BVA remand instructions for this veteran," so it's very clear that the doctor has seen it.

We also tell the doctors, "Answer only the questions asked."

At this time now, this is going to a court. Now, the court is coming back and asking us very specific questions. These aren't generic questions. "So if there's three questions there, answer the three questions, Doctor. Don't make up a fourth question, a fifth question, a sixth question, because sometimes that just opens up a Pandora's box and brings it right back."

Now, the Court says, "Now, there is a new problem. You haven't answered that one," and it goes through the litigation again.

Opinion terminology. I tell my doctors, "More likely than not, the probability is greater than 50 percent. At least as likely as not is 50 percent or greater, and not at least as likely as not is less than 50 percent."

So, doctors, we're not asking you to say, "Is it 97 percent or 98.5 percent or 77 percent." We're saying, "Is it 50-50 greater chance than that, or is it 50-50 or greater, or is it less than 50- 50?"

Actually, it's easier for us than it used to be because the Board used to ask us for specific percentages, which a doctor just can't give. So this, I think, gives doctors much more leeway, and we should expect that they can do this.

Now, once in a while, the doctor can't make this decision at all, and if they can't, then I want a rationale from them as to why you can't even decide whether it's as likely as not or not.

And I will tell you, we don't get very many of those back. It's very, very unusual.

One of my doctors the other day said, "Well, this is like asking me where I got my intelligence, what percentage came from my mother, what percentage came from my father. Is my father's intelligence at least as likely as not the contributing factor?"

I guess something like that, I'd have to say, "I really can't tell you. You know, just no way." First of all, I'm going to displease either my mother or my father, no matter what I say, right? But we don't have very many of those questions.

Now, how to conduct the examination, Doctor? And we make it very clear that this is different than a treatment examination. Review the claims folder first before you do anything else.

And, by the way, our RO in Chicago sends us 99.9 percent of the C folders for R cases and that's because I used to get less than 30 percent of them. And I said, "It's not fair to the doctor or the veteran to have the patient seen and the doctor not have all the information.

Now, I'll tell you the RO is very concerned that we might lose the records, that we might alter the records, that we might burn the records. I don't know. We'll eat them. I don't know what they

thought we were going to do with them.

But now they all come to me personally. I sign for them, and they go back. And I'm going to tell you that we have not misplaced a record in the last five years, so we're doing pretty well.

First of all, Doctor, review the claims folder, the C file, before seeing the veteran.

In the report, state whether or not the claims C file is available for review. State, "The C file is available and has been reviewed by the examiner," or, "The C file is not available to the examiner."

And I will tell you, this last statement raises some eyebrows with some of my rating specialists. Some of them say, "Oh, I want you to say this and I don't want you to say this."

And I said, "Well, if we're putting facts down, I have to have facts, especially if you come back to me two years from now and say, 'Dr. Coulson, I didn't like the opinion you gave,' I might look at my report and say, 'Well, I didn't have that C file, so there, I really didn't know some of the old information.'"

And we doctors are taught, when we are writing up any kind of medical opinion for treatment purposes and the veteran comes to a clinic or the patient comes to a clinic and the medical record is not available, we always state, "The medical record is not available today."

That connotes to future reviewers that I am basing my opinion today on what the veteran tells me and not what the old record states. So I think it's very important to do both of those things.

I think writing this also helps me get all the C files to my RO because he didn't want to see that written in the reports, and so they start sending them to me.

Follow the worksheets, Doctor. Follow all the worksheets instructions. Do not order diagnostic tests or additional examinations not required on the 2507, the worksheets of the BVA remand.

The reason for this is my doctors quite often used to look at all the things they were asked and then say, "Well, maybe I'll just do a complete examination on the veteran, too," or the veteran says, "Oh, by the way, doc, while I'm here, I want you to look at this part of my body," and the doctors would do that.

What it did is open up a Pandora's box. It almost looked as if the C&P doctor was certifying that, indeed, this new claim of the veteran which hadn't come through the RO now might be well grounded. So we have decided to stick with the specific requests.

Now, we do have rating specialists at our hospital sitting right next door to my C&P doctors. So if a veteran comes in and says, "Doc, the 2507 says, left shoulder, but it wasn't my left shoulder. It's my left knee," that's bothering him.

My doctor walks over to the rating specialist and says, "The veteran is claiming a knee instead of a shoulder. Is it okay if I do the knee exam?"

And, generally right then, the rating specialist looks at the report, looks at the C file, and says, "Oh, yes. We made a mistake. It is the knee."

Or sometimes he will say, "No. It is the shoulder that was injured in the military. Now,I will authorize a knee if the veteran is saying that, 'My knee is injured because of the shoulder.'" Or more commonly, "My knee is bad because of my hip," things that go together. But we always get an okay from the rating specialist before we do that.

Diagnoses. A definite diagnosis must be given. Now, I will tell you that doctors and lawyers think differently. Doctors think in possibilities. Lawyers think in probabilities.

I would say, "It is possible that this man had a heart attack this morning," or "It is possible that the pain is due to the fractured ribs."

A lawyer will say, "No. Tell me about the probability of it. What's the probability that the pain is due to the fractured ribs?"

The following terms are not acceptable, doctors: "Rule out," "status post," "history of," "possible" -- all the things that the doctors are trained to write in medical school. You're trained to write this because "rule out" are all the things that I'm thinking of.

This is my differential diagnosis we talked out. The rule out would be, in this person, fractured rib, heart attack, right?

Status post. What is the status of this case? Well, a status, it used to happen. It's in the past. That's what the doctors are stating here.

"History of" really means the patient tells me something that I haven't been able to verify. History of falling out of an airplane. Well, I didn't see it in the military records. That's what the patient says. Or possible. So we have gotten our doctors away from using these because these don't stand up in a court of law.

Now, that's the course that we give to our doctors. I'm going to give you just a couple of minutes now, if you have questions about this, and then I'm going to show you something else. I'm going to show you a way that we have now of trying to standardize the writing of exams and having them typed in the computer, and I'm going to show you some computer programs that we use.

I saw one hand here, and then I see a hand over here.

MR. BOSLEY: Yes. What is the possibility of this sort of program getting to the RO's around the country and making sure that the doctors speak English?

DR. COULSON: Oh, I'm sorry. We need your name.

MR. BOSLEY: I'm sorry.

DR. COULSON: Why don't you stand up. It's all being recorded. Say the name and spell it, if you need to.

MR. BOSLEY: My name is Wade Bosley, B-O-S- L-E-Y. And my question is, what are the possibilities of a program like this getting to the doctors at the RO's around the country as being taught only in English?

DR. COULSON: Okay. I think what we have to do -- we, meaning the VA -- we are one VA now, right? We're not a BVA and a VBA, right? One VA, and veterans want to see it that way, too.

I think we should do exactly what you say. We should decide on a national training program and go around and foster this to each of the VISNs in the VHA.

We have 22 VISNs. VISN is a network. In my VISN, we have three Chicago hospitals, Milwaukee, Madison, Wisconsin, Iron Mountain, and Michigan. I'm in charge of all of those.

The second thing, and maybe even more important, is we need to convey the high priority of C&P exams to everybody. And I think BVA knows it because that's their livelihood. I think VBA knows it because that's their livelihood. I'm not so sure that VHA always knows it because that isn't what they see as their livelihood.

But I think we need to do all of those things, and you need to help us push this nationwide.

Yes, ma'am?

MS. CHOU: Marian Chou, C-H-O-U, and my question specifically is quite often and lots of times, those doctors are not qualified as specialists. How can they render an opinion for which they ought to be qualified as experts?

For example, just an MD is not necessarily able to render orthopedic opinion.

DR. COULSON: Okay. What is the definition of a specialist?

The VBA's definition of a specialist is someone who has knowledge about that part of the body. Now, that is different than a medical definition, which we have a medical certification. So board-certified specialist is different than a specialist, and those are the two things that we sometimes miss.

A board-certified specialist is someone who has actually taken a Board in that specialty.

A specialist is someone who is very knowledgeable about a subject, so we generally say to a doctor, "What do you feel comfortable with?"

If a doctor doesn't feel comfortable with a type of exam or if it's a question that they can't answer, we do expect them to get a consultation from someone who does know.

Joint exams are a very good example. If, indeed, a patient is here for a review of a knee and the question is, "Is it worse," and you know what the diagnosis is, arthritis of the knee. The veteran says it's worse, what you really need for a rating is range of motion and what limits the range of motion and where is it limited and what is it limited by. A, disability, weakness, right?

And what happens during flare ups. That doesn't take a board certified orthopedic doctor to do that, okay, but somebody that knows all the things that we just talked about here.

On the other hand, if it's a brand new original case, and this is a disease that I, as a doctor, don't know anything about, it's a bizarre case, of course, we need a board-certified specialist.

So we interpret "specialist" as someone knowledgeable in the field, not necessarily board certified.

Yes, sir?

MR. SMITH: Yes. Austin Smith in reference to the Boards here in Washington. I have a question. Earlier, you threw out the statistics out of one of the hospitals in Chicago, 99 plus percent in terms of cases that were sent to the hospital for review prior to an examination.

Now, is this nationwide now, or you're visiting it? And the reason I'm asking is, in years gone by, usually the regional office wouldn't send the folder over unless it's a psychiatric case or something, and those would, in all likelihood, would go.

But in a lot of cases, I would find where the word opinions from medical doctors who treated the veteran for a long period of time, I would request that that folder be transferred over for a new private examination so the doctor could see those examinations.

But that's what I'm wondering now. Nationwide, are they starting to send them over?

DR. COULSON: I would tell you that everything I just talked about here is within my own VISN, because this has been our group that has done this. So what I'm saying here is not something that's done nationally, but I certainly think it would be very wise.

But you have to understand why a doctor believes that having access to more information is more beneficial to them. I think it's more beneficial to the veteran, too, to have it stated that the doctor did, indeed, see and review all the information.

Now, that doesn't mean that a doctor is going to look through absolutely every page in that C file. But we certainly go through and pick out the important things that are pertinent to that case.

Yes, sir?

MR. COHEN: Richard Cohen, private attorney from Fairmont, West Virginia. In the private area, when we get consultive exams, we always get the vitae or the credentials of the doctor who's performing the exams.

Generally, almost uniformly in the VA exams, we have no idea of the vitae or the credentials.

Do you have your doctors indicate what their credentials are in connection with the C&P exams they render?

DR. COULSON: Well, what we do in Chicago is, I have a select group of doctors who do C&P exams. Those credentials are with the RO. So we don't put the credentials on each report, except that we do say joint specialist or heart specialist or whatever.

The problem comes in many hospitals where they pick the doctor de jour, the doctor of the day, right, and I think that is part of the VHA's problem is that every doctor in a medical center cannot know all the things we just went over, and they're not all equally qualified to do it because they haven't got the training. You might get a doctor that you've never heard of before and don't know who they are.

So, again, what I'm talking about here is what we do in the Chicago area.

Yes. Oh, my goodness. Keep going.

MR. DOUGHERTY: My name is Ian Dougherty. I'm a private practitioner in Phoenix, Arizona.

You opened your discussion with the note that what you seek to do is find out what the VARO wants. You also talked in terms of being an expert witness.

Both of those statements indicate more of an advocacy role than a pure evaluative role to me. And if you want to know what the VA wants, as opposed to what the veteran wants, you are assuming an advocacy role, and you've become an expert witness for the VA, you are assuming an advocacy role.

This causes a problem with me, and I was wondering whether you instruct your evaluating physicians on another portion of the VA law which says the veteran is entitled to the benefit of the doubt when the doctor is in doubt.

DR. COULSON: I think that's very good. Number one, you never allow a doctor to do a C&P exam if they know the veteran or are treating the veteran because there's certainly a conflict of interest there. No question about it.

Number two, when I say we do what the regional office needs for rating purposes, I mean we follow whatever the request is. Whatever it is in the exam worksheet that says that needs to be done, that's what we do.

If there's an opinion asked, tell me whether it is at least as likely as not or not at least as likely as not. Then my doctors do that.

We don't look at it as a way of giving the veteran money or saving the government money. I mean that's what we don't want to do.

But I do agree with you that our job is to be unbiased and to look at the facts, nothing but the facts and render an opinion, and we try our best to do that.

Yes, ma'am. Yes?

MS. KORITTA: My name is Pat Koritta, K-O-R-I-T-T-A, National Veterans Legal Services Program.

One of the common complaints that you hear from veterans is, "Well, the doctor only saw me for 10 minutes or 15 minutes," or, "He really didn't even touch my knee."

How do you address that with your doctors in terms of time limits?

I know a lot of them are maybe overbooked with patients.

Are they told, you know, a time limit that they have to spend or --

DR. COULSON: You're very good. That goes right to my next little topic. Keep that question and we'll do it at the end, okay?

I have a little computer program that I wrote for my new doctors because even though they sit in a course like this, they go home at night and they forget what it was that I said, okay?

So if there's a little computer program that they can take home with them and answer some of those questions. I'll just show you what I give each of them to take home.

What this does, this allows the doctors to have a tutorial. We have an introduction, definitions, type of exams requested, what to do before the exam, how to perform the exam, how to write the report and sample exams, and they can learn a lot of these things.

This is all the things that we were just talking about here. Definitions. Again, some of the things we just learned here, compensation, what pension is, what a C&P exam is, what a request form is, what a claims folder is, what the exam worksheets are all about.

The types of exams, again, service connected, increase, review, pension, and BVA remand so they can go back and they can do this on their own.

Now, before the examination, we say allow approximately 15 to 30 minutes for review of the C file, including the service records, reviewing previous C&P exams, review 2507 request, including remarks. If a BVA remand is present, review that, and follow all the instructions on the worksheet.

Now, I will tell you that not all doctors have the same amount of time. You add up the time we're going to talk about and you're going to see how long it takes to do a good C&P exam.

Now, if you have the patient scheduled into a clinic with everybody who has high blood pressure and diabetes and strokes, how long does the average doctor spend with a patient in this country? Do

you have any idea?

Most appointments are 20 minutes, 30 minutes maximum. You couldn't even finish reading the C file in 20 minutes.

So if you give it to a doctor who is doing all kinds of other things, what are they going to do? They're either going to shortchange reading the C file, or they're going to shortchange seeing the veteran.

Now, if you have to review the C file, see the veteran, and write an opinion in 20 minutes, there is not much time left to see the veteran.

So I suggest that 15 to 30 minutes as a minimum to review the file. And I will tell you, for those of you who view C files, doing a good C file review in 30 minutes is not very easy to do, right?

Next, performing the exam. And I say allow 45 minutes for actually doing the exam.

Number one, you have to explain the exam process to the veteran. Now, some of our veterans know the exam process better than we do because they've been through this quite a few times, but the originals have. So I always tell my doctors, "Introduce yourself. Say to the veteran, 'Nice to see you.' Show that the C file is on your desk and that you reviewed it, and explain the process that you are here today to do an examination based on the individual claim or claims only."

We're not here to do a complete examination or to treat the veteran. If they have a problem that day and they're sick, we would be very happy to take them down the hall to the treating doctor as soon as we're finished. But we don't want to mix the unbiased opinion that we're supposed to be giving as an expert witness with treating the patient, as an advocate.

Tell the veteran you reviewed his or her records. Be compassionate and listen.

Listening is the most important thing, by the way, that doctors do. We should do mostly listening and little talking, but that doesn't always happen.

Follow instructions on the request and the worksheet. And, finally, at the very end, ask the veteran if they have any questions.

We do that with patients, too. If at the very end, you say, "Do you have any questions," the veteran may not have any, but they kind of feel that somebody's asked. It's a way of finishing off the exam process.

If they do have questions that I can't answer, I have a rating specialist two doors away. And I'll say, "Well, come right over here, and you can talk to our rating specialist," especially if they have a new claim they would like to put one in.

Writing the report. Now, a report, you don't just rattle off in two minutes, either. It takes between five and ten minutes. And I tell my doctors, "When you are writing the report, do the following:

Include the veteran's name and Social Security number. Include all the information that's on the 2507 request, what type of request it is, whether or not the increase, if it's an original."

Indicate the C file BVA remand were reviewed. History and physical findings that were asked on the worksheet. Include any questions or requests from the BVA remand and answer those very specifically, and answer all opinions using the wording in the remand. Don't make up new wording because this has been sent back to you specifically to get clarification on a specific topic and specific wording, and usually, the wording comes right out of the law.

So, again, to make it better for the veteran and easier for all of you who are their advocates, we want to answer the Court's question correctly the first time and not have it come back again because of miswording.

And I find that many of the BVA remands that come back is because somebody just didn't answer the specific question that was asked. It has nothing to do with whether the veteran is entitled or not. It's that wording that needs to be there.

What I tell you, my doctors all have an hour and a half for every case, except for a PTSD, which we allow two hours.

Now, if you do PTSDs all day long, you can only see four in the morning and four in the afternoon, maximum, right? Not very productive from a doctor point of view when the director looks to see what we're doing. They see that the doctor who sees high blood pressure, sees 35 cases a day. So they'll come down and say to my doctors, "Why do you only see six or eight cases a day, and the other doctors can see 35?" And I have to explain to them that a C&P exam is much, much different.

Now, at the very end here is a little sample exam that the doctors can do to actually practice, and this is actually a text generator that allows the doctors to start writing. Many doctors can't type real well into the computer and we are asked to have our exams typed.

There are several ways a doctor can get a typed exam into AMY, into our computer system. One is to type it him or herself. Number two is to dictate into a dictating machine and have a transcriber transcribe it. The doctor will then go back and review it, edit it, and sign it.

Number three, they can use a program like this that actually is a text generator.

Number four, they can use voice. Number five, they can do something other than that if it gets the exam in. So let's just start this one and I'll show you how this works.

So this is Mr. Gordon Smith. Okay. Date of birth. Okay. Generates the age already for us.

Okay. Now, it starts to write the exam for us. Puts the patient's name down, Social Security number, date of birth, age, sex, race, telephone number.

Now, we can go and we can look at the RO request. Chicago regional office is where I work, but

I also work out of Indianapolis and Minneapolis.

Type of request. This will be an original SC, and a selected exam will be a general medical.

Current rating. We get 10 percent for cardiology.

The date in the military, 1943, at the age of -- where was he? Don't give me these dates now.

Germany. He was in the Army, and this all happened during basic training.

This is the date of the examination, but I can change it.

Place of the examination. Information obtained from the patient, or sometimes, it's not the patient. If the patient is unable to talk, it may be a wife, husband, someone else who works with us.

Was the C file available and reviewed. Okay. Again, all of this now is placed onto our report. History of the complaint. We'll say the patient -- this whole problem with his shoulder began two years ago.

What was he doing at onset? We'll say he was climbing stairs. Gradual onset, and you can see what you're doing is you're actually generating words and text.

Location, on the left side of the body on the upper chest. Radiates to the lower back. Precipitated by climbing stairs. Aggravated by debriding and running, okay. It's alleviated by leaning forward, and the medicines are nitroglycerin.

Okay. Here we go. It began two years ago with the gradual onset. It occurred daily. It occurred during climbing stairs and was aggravated by belching. You kind of get the idea.

And then if they're going to do a joint exam -- by the way, past history, we could do this with the past military history, what happened.

And let's just do a joint exam because joint exams are one of the things my doctors have the most difficulty with.

So if it's range of motion that we're doing on the right side of the body and it's a shoulder, the first thing they get on the screen is what are the normal movements of a shoulder.

There are six normal movements. These are the normal maximum ranges. So if flexion on this patient is actually 175 degrees, limited by pain at 170, extension is 85, limited by fatiguability. And we'll say this one isn't limited at all, and abduction is, we'll say, 170, limited by weakness at 100 -- you can kind of get the idea.

So the doctors all use the same terminology, and it makes it easier for them, and also, they have the things here that they're supposed to choose so they're not making up other types of things.

And here we have it. The range of motion on the right -- for the shoulder on the right side, flexion extension, what the normal range is, what their range was, limited by pain, okay?

For a mental examination, we can do the same thing, and I have a lot of trouble with PTSD. So here is a PTSD exam. You have to follow all of the rules of the DSM-4 or you won't be able to make a diagnosis of PTSD.

Everything that's grayed out is not applicable at the moment because the first thing you have to say is, "Was the person exposed to a traumatic event?"

Both things have to happen according to DSM-4. The person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death and serious injury, or a threat to the physical integrity of self or others. So we'll say, "yes." That was certainly true. They were in Vietnam and they were being bombarded and shot at, okay, and maybe they saw the death of their best buddy. And the person's response involved intense fear, helplessness and horror.

If both of those things happened, the next box lights up, so we can proceed. If one of those two things is not true, that's the end of PTSD.

The next one is, "What was the event?" Enemy fire on self or sight of dead and injured people.

"Where was this?" This was in the military.

By the way, all PTSD doesn't happen in the military, right? You could have had an automobile accident two years ago in which your wife and your two children died, and it would be PTSD, but it would not be related to the military, right?

Okay. "When did this happen?" We'll say the summer of 19 -- use any year that you want. Take this one, an older one. Well, let's give him 40 -- let's see, 60. Make it Vietnam.

"Did symptoms begin within six months?" It has to be within six months for a DSM-4, okay? The answer is, "yes."

"Did the symptoms last greater than eight months?" Okay. It has to.

Now, the next -- you see what we're doing? We're keeping doctors all doing the same thing and knowing what all the rules and regulations are.

If a DSM-4 ever changes, we can change the program so it keeps up with DSM-4. And we'll just keep doing this. You have to have three of these things, okay?

We have to have one of these things and we have to have two of these, and suddenly, look. Criteria for PTSD is fulfilled. We click on that, and here, we have the PTSD criteria was met, and here's all the information about it. So this gives you a pretty good indication of what you can do.

Now, for those of you who say, "I still can't even type" -- this was one-finger typing that I was

doing, correct? My doctor should be able to do one-finger typing, although I hear someone say, "I don't have any fingers, you know." So we have something else, too. We have voice.

How many use voice in here? Good, good, good, good. It's great for lawyers, for opinions.

"This is the first hospitalization for this 46-year-old black male, comma, with a history of congestive heart failure and diabetes."

(Laughter.)

DR. COULSON: "Period. The diabetes began in 1948, and he has been treated with insulin ever since, period. Stop dictation."

Now, what you have to do is you have to check to see what words were not right, as you're doing. And I put some words in here so you can see how we do the correction because what we're going to do is we're going to teach the program next time not to make those same mistakes.

"This is the first hospitalization for this 46-year-old black male," okay? That's what I thought it said. Now, maybe I said "blackmail," okay? I'm going to go back and hear what it was I said.

"With a history of congestive heart failure and diabetes. The diabetes began in 1948, and he has been treated with insulin ever since." So out of those two sentences, one word is incorrect.

Now, let's go back to the word, "black male," and listen to what it was that it heard me say.

"Black male." Okay. Now -- so you can hear whether or not you think you said "black male."

Do I want it to -- next time it hears me say exactly that, type "blackmail," or do I want it to type "black male." I think I said it pretty well.

So what I'm going to do here is just make the change, okay. Say, "Okay," and then for this one, which is the male, "black male," let's just do it. Okay. So now, the next time it hears that, it will know what it was I said.

The computer is much better than doctors or our kids. You tell it something once, and it always does it.

So the other thing that you can do for something like this is if you have canned paragraphs -- lawyers are good at that. Got their little paragraph A, plus something, D, okay. You can even say to the computer, "paragraph 1, 2," and it will type whatever it is that you say is "paragraph 1, 2," or remand. It will type whatever it is that you have. We call those "macros," okay.

This is very good for people who write the same type of things over and over and over again. An example in medicine would be a radiologist who says, "normal chest x-ray." And normal chest x-ray says, "The heart was normal size. The lungs were normal. The diaphragms were fine. We had no problems with the lung fields. Conclusion, normal exam."

Now, why should a radiologist have to type that each time they have a normal x-ray, but you can have it say, when you say, "normal chest," it just rattles everything off.

So these are all different ways that we have of trying to get doctors to comply, number one, with typing, and number two, standardize what it is that we're all saying.

Okay. Now, let's go back to some of the questions because that was in response to the one question that you had.

Yes?

MR. COHEN: My name is Richard Cohen. When the schedule of ratings is amended, how are you informed of that so that your exam will change so you can coordinate it to the criteria that are being discussed, and when they are amended, how long does it take you to update the exam worksheets?

DR. COULSON: The exam worksheets are in the computer system nationally right now. So when they are changed in Washington, they automatically are changed every place across the country. That's one of the things that are completely standardized.

So whenever we make a change in the worksheet, if I print off the worksheet tomorrow, the new worksheet prints off. So that's how I can tell you is one of the things that is completely standardized. I wish everything were that easy to standardize.

MR. POTTER: Yes, sir. I'm Marshall Potter, private practitioner.

In attempting to develop a case or a review by the VA, I often attempt to contact the VA doctor who is the treating physician.

Invariably, I am stonewalled and get no answer, or my client will tell me that the doctor, who has told him something, tells them that the VA prohibits him from giving any opinion or anything else.

In my opinion, this creates an adverse effect on his ability to present this claim, and in some ways, vitiates your examination because your doctor is not advised of the opinion of the treating physician and goes, as you say, based on the RO's questions, which they are saying are directly in contrast with the, in some cases, the VA stated policy of a non-adversarial position.

Can you explain why the treating VA physicians are either prevented from or refuse to grant these, especially since the VA requests all this from us?

DR. COULSON: Do you want to turn the lights on back there? We'll turn the lights on.

I think I heard two questions. One is if the VA physician is actually acting as the treating physician, why can't you get information from them.

MR. POTTER: Correct.

DR. COULSON: Okay. And the answer is, you should be able to, but not over the phone.

MR. POTTER: That has been my point. I have written letters and they have never been answered. As a matter of fact, I have gotten correspondence from VA Medical Directors at the hospitals that it is against their policy to do so.

DR. COULSON: What we -- our policy is that if a veteran -- usually it's the veteran that brings in the request from the lawyer, you know, saying, "I need to have this information."

Then generally, what I ask my doctors to do is to put that information, to the best of their knowledge, into the medical record, and suggest the patient request a copy to release some information.

We cannot answer your questions over the phone because of privacy. So it would have to be through a letter, through the veteran bringing a letter in to the release of information section. So that should work pretty well.

Now, if it doesn't work, there could be a problem in the individual hospital that you're talking about.

MR. POTTER: Well, as I say, it's never called, and my letter is specific questions, and they're always by letter, and they're either not answered or -- they're not answered, period.

DR. COULSON: Okay. Well, I think that needs to be taken up with the Director. But I think if there are written requests brought in by the veteran, it's the veteran requesting copies of his records.

Now, I can't always give the opinion that the veteran wants. Now, you have to understand that. The veteran comes in to the doctor and says, "I want you to say that this was due to a bomb." The doctor may not be able to do that, but they can give an opinion.

MR. POTTER: Well --

DR. COULSON: They should give an opinion. It may not always be the opinion that you and the veteran want.

MR. POTTER: I'm not questioning that. I'm just asking for the opinion, not anything else.

DR. COULSON: You should be able to get that, yes.

MR. POTTER: Well, I never get it.

DR. COULSON: Okay. Then I would talk to the chief of staff of whatever hospital that is and see.

MR. POTTER: That's an exercise in futility, frankly.

DR. COULSON: If it's from Chicago, you send it to me. How about that?

MR. POTTER: Okay.

DR. COULSON: Okay. Yes, sir?

MR. RUSSO: I'm Paul Russo. I'm from Park. Mr. Cohen's question about documents, I do training from Park, and (Inaudible). What we're doing is we always hire Board Certified doctors as being doctors on (Inaudible). Always board certified (Inaudible).

What we do with VA documents is we go on the Internet, find out, first of all, what the doctor likes (Inaudible). We also find out (Inaudible), and we have (Inaudible).

DR. COULSON: Yes, ma'am.

MS. CARL: Brenda Carl. I wonder if it would be possible, Doctor, to get a copy of that information (Inaudible)?

DR. COULSON: You want the slide show, you mean?

Well, I'll tell you what. If you send me your name, I'll be very happy --

MS. CARL: And the tutorial and --

DR. COULSON: The tutorial, too?

MALE VOICE: She wants (Inaudible).

DR. COULSON: Oh, you want -- you mean this computer program?

MS. CARL: Yes.

DR. COULSON: Oh, I'll be very happy to make that -- sure.

What do you do?

MS. CARL: I work at a law firm in Topeka, Kansas (Inaudible).

DR. COULSON: Oh, okay. Just send me -- you're on Outlook?

MS. CARL: No.

DR. COULSON: Microsoft Outlook? What kind of e-mail do you have?

MS. CARL: You mean the browser?

DR. COULSON: Uh-huh.

MS. CARL: We have Netscape.

DR. COULSON: Okay. Why don't you send it to me, if you want to write down my e-mail address. It's Lewis, my first name, dot Coulson@Med, M-E-D, dot VA, dot Gov.

MALE VOICE: G-O-V?

DR. COULSON: G-O-V, uh-huh.

MALE VOICE: I'll just have Carl DeGrassi go by your office to get us some --

DR. COULSON: Carl DeGrassi is in my office often.

MALE VOICE: That's what I figured.

DR. COULSON: Oh, you figured that?

MALE VOICE: I'll get him while he's up there.

DR. COULSON: Okay.

MS. CARL: Could you repeat that one more time?

DR. COULSON: Oh, Lewis, L-E-W-I-S, dot Coulson, C-O-U-L-S-O-N, at Med, M-E-D, dot VA, dot Gov.

MALE VOICE: How do you type that?

DR. COULSON: Oh, just tell me where you were and you were here, and I'll send you a copy of it.

MALE VOICE: Yeah.

DR. COULSON: Okay. Oh, what do you want to call it? Why don't you call it C&P tutorial. That's fine.

MALE VOICE: C&P tutorial.

DR. COULSON: Now, what you're talking about is this little computer program that I just did at the end? Yeah.

I mean I think most of the things on the slides, you know. Those are the things that I teach my doctors, but it's the tutorial that you want. Yes.

MR. BOSLEY: I have a question on your PTSD exam.

DR. COULSON: Uh-huh.

MR. BOSLEY: This is Wade Bosley again, private attorney from Indiana.

You had three buttons, the symptoms less than one month, one to three months, within six months. And then the next box lit up.

You also have one for PTSD, comma, delayed onset, where the symptoms come out after six months to have the other boxes light up?

DR. COULSON: Well, those will be exceptions to the rule, and the doctors could always type any of that in.

We have the things that are the standard, right? I mean doctors can do anything they want to.

And in -- by the way, at the very end here, doctors can type anything they want to here. This is a regular word processor, so they can just type to their heart's content, if they want to do that.

MALE VOICE: They're going to put buttons (Inaudible).

DR. COULSON: Well, the buttons are the standard things, yes, and it's very hard to have buttons for every exception in the rule in the world.

Yes? Somebody else had another question. Yes, sir?

MR. JARVI: Ted Jarvi again. One of the -- two of the problems that I've encountered in doing VA exams is that the remark, "C file present," or "C file available," rarely gives any kind of an idea about where the doctor got his background or history information.

Frequently, the doctor is getting his information strictly from the vet and not from the C file. Sometimes it's from the C file and not from the vet.

It would be very helpful if there was more of a remark than just, "C file present," when relating the history that the doctor is depending upon to arrive at a diagnosis.

DR. COULSON: But if a doctor says that, "I reviewed the C file and talked to the veteran," you'd want to know specifically every time he says something, is he referring to the C file or is he referring to the veteran?

MR. JARVI: I want to know if he's getting his background history because --

DR. COULSON: Well --

MR. JARVI: -- sometimes it's (Inaudible) and that's important.

The second question I have is many of my clients tend to be inarticulate, and in preparation for going through a VA, I tell them it would be a good idea to write out a list of the symptoms that you're experiencing because they get panicked or upset and they don't remember to tell the doctor everything.

Almost invariably, those are rejected by the doctor. The doctor says, "If you want to file anything, file it with the regional office," and it doesn't get in the file.

Only one or two times have I had a VA doctor accept such a document and actually deal with it in the examination.

DR. COULSON: The first question, if a doctor heard something from a veteran that wasn't substantiated, we usually say, "by history." So that's usually a clue that something the veteran has told us that we can't substantiate.

As far as anything the veteran brings in, whenever a veteran brings anything in, their own statements, statement from a buddy, a list of things, I always say to them, "Would you like to have this included in your C file," and we can do that.

I simply put it inside the C file when it goes back and my rating specialist then decides whether or not it's appropriate. But almost all the time, it's appropriate to do that.

The other, though, is very important. Even if you're a patient, make a list of the things you want to talk to your doctor about before you get there. But I say that to my treating patients, too.

You get to the doctor and you can only remember two of the five things that were bothering you all week. And the patient says, "I got three more things, but I can't think what they are."

Well, the doctor doesn't have time to sit there and go through the five million things that it could possibly be like multiple choice. So I generally say to the veteran or the patient, "Go home. Next time, whatever that is happens, write it down and bring it in to me."

So there may be a list of things they just want to tell me that wouldn't be appropriate to put in as a permanent part of the record, but I would certainly tell the patient these things.

But then there's other things that probably are much more appropriate to be put in as a permanent part of the record. Certainly, statements from private doctors, buddy statements and things like that.

But I also give those to the RO, and then they generally decide. But we do that.

Yes, ma'am?

MS. CHOU: Mary Chou, again. The question I have is when we do each application, we write down what we really do, each thing. Why the doctor when they examine, quote, unquote, "our patients," like what you said, the doctor could examine 35 patients versus eight patients or even less.

Why can't they break down, say, our review of C file, ten minutes? I examined them, 20 minutes.

Why there is no indication there?

DR. COULSON: About the time?

MS. CHOU: Why not?

DR. COULSON: Because --

MS. CHOU: Because what you break down for us is average from 50 minutes to one hour and 15 minutes, about that.

DR. COULSON: Well, I don't know --

MS. CHOU: Because --

DR. COULSON: If the (Inaudible) would agree that time is quality necessarily, right? You could spend 20 minutes on something and not do a very good job of it. You could spend ten minutes and do a good job.

I don't know that time would be -- I'd have to ask the judges.

Any judges in here? Would that be helpful in court?

MS. CHOU: Because a lot of time, our C files is very, very thick. It takes attorneys hours of work to review it. How can a doctor review everything in 15 minutes?

DR. COULSON: And that's why I said that I like the way BVA remands are written so much, because it is obvious to me when I read a BVA remand that somebody has sat down and done that review for me.

I don't get that all the time from the RO's. The RO's generally say, "Read the C file and tell me what you think."

And I generally say, "I think it looks big."

(Laughter.)

DR. COULSON: Yes?

MR. SMITH: Austin Smith from the Veterans of Foreign Wars in Washington, D.C.

Although the BVA remand is very clear, it's not always complied with, unfortunately.

DR. COULSON: Oh, no. But we have to start with clarity first. You're right.

Yes, sir?

MR. COHEN: Richard Cohen, again. There is a manual for physicians' exams which has certain protocols. Among those, the items listed in the protocol, is the need to correlate the present diagnosis with previous diagnoses and to explain away if there is a difference.

I didn't notice anything about that in the program that you had up here dealing with a prior diagnoses if the BVA remand doesn't mention it or if the RO doesn't mention it, but it is there in the C file.

DR. COULSON: Well, I think in the reviews and the increases, I thought I said that the doctor is supposed to look at the previous C&P exam and correlate that, obviously.

The question always comes, "What happens when you're reviewing a case and the doctor thinks the original diagnosis is incorrect?"

Generally, we try to stay away from the doctor saying, "I think the original diagnosis was not correct because we weren't there." It's kind of hard to say that.

But I think, generally, what we will do is say what the diagnosis is today, and if there is a great disparity, and once in a while, there is a disparity from a hip to a knee or something like that, and we'll say, "The patient claims they never did have a knee injury, and there always was a hip injury, even though they're service connected for the knee."

But I'm going to let the RO deal with that one. I have enough fights on my hands. I don't want to fight with everybody.

But I do agree that correlating it with it, and usually the correlation would be the patient has a worsening of the chondromalacia of his left knee, and now he can only walk a half block instead of the three blocks that he could walk the last time he had the C&P exam. That's the correlation we generally make.

MR. COHEN: Doctor, what I was specifically referring to is prior diagnoses of PTSD and the C&P doctor says, "No, it's not PTSD. It's personality disorder."

DR. COULSON: Right.

MR. COHEN: There's a need to explain how he's coming up with a personality disorder if all the treating doctors said it's PTSD.

DR. COULSON: Well, we generally get that back as a reconciliation of diagnoses, especially if you have two different doctors with two different diagnoses.

Now, I will tell you that treating doctors sometimes see this differently. They -- first of all, are they advocates, and I think sometimes are a little bit biased on that side.

Number two, sometimes we're treating them for a PTSD which has nothing to do with military PTSD, you know. And so if we say, basically, there is no military stressor that would justify a diagnosis of PTSD due to military service, and then the private doctor says, "Well, I'm treating for PTSD because they were run over by a car two weeks ago," but don't understand the difference.

But a reconciliation diagnosis is what we get back a lot, and sometimes we even have to have a board of two or three looking at that. And what we do is we have the doctors sit down and discuss why there was a disparity and what their new opinion is.

Again, it's one more opinion, right? And opinions are always fraught with some error.

Yes, sir?

MR. POTTER: Yes. Marshall Potter, again. You mentioned -- oh, Marshall Potter, again. You mentioned that, and obviously, I agree that a physician can't do a physical examination over the phone. How about a psychiatric examination? What's your opinion?

DR. COULSON: Over the phone?

MR. POTTER: Yeah.

DR. COULSON: I would be very leery.

MR. POTTER: You would be leery. Okay.

DR. COULSON: Yes, ma'am?

FEMALE VOICE: I'm curious at something that you said, but it was also something I saw in one of your slide presentation.

I believe this gentleman asked about a difference in diagnoses, and should you find that there's a different in diagnosis, is there -- and I believe you indicated that most of the new doctors try to stay within the requested examinations.

Is there a time where you determine that there's such a vast difference in additional -- if testing is necessary, or are you -- and then give your recommendations as to the type of testing that should be done, or are you (Inaudible)?

DR. COULSON: The answer to the question asked would be, with my own expertise at that day, I then would send for a consult if there were any questions in my mind before I send that back.

When I send back to the RO, I'm really saying, "I'm finished with it and I'm giving an opinion."

What we don't do is to add new things. The only time we add new exams is when the person has been out of the military less than one year, general medical exams, things like that that are exceptions to the rule.

Usually, if the veteran is claiming something that isn't on the worksheet I do not go ahead and take care of it. I will talk to the rating specialist right there, that day. Then they make a decision. I know.

DR. COULSON: I'm sorry. You know, we are going to have to break for lunch.

There's a couple of questions over here. Why don't we take one more question, and then anybody that wants to come up and ask me, instead of eating lunch, can do that.

Yes, ma'am?

MS. PASCULI: Felicia Pasculi, a private practitioner from New York.

The question I had, Doctor, is if you could distinguish what you had talked about regarding a history of a patient, because one of the more frustrating experiences that I have in this area of the law is that the BVA will often say that the doctor relied on the history provided to him or her by the veteran. And, by inference, they're saying that that's why you came up with that diagnosis.

So how is it exactly that you distinguish what you took into consideration to make a diagnosis and what you didn't?

DR. COULSON: Well, I think we've heard today that the majority of doctors across the country don't have the C file available. So if they don't have the C file available, it is by patient history.

We weren't there. We don't know. So if there's no C file available, almost everything is going to be by patient history.

If I have the C file available, then there's a lot of things in there to give me some evidence. A private doctor, for one. A test being done at a private hospital. The previous C&P exam.

I think this all goes to show us why it is very important to have as much information as possible in the doctor's grasp and then have the doctor use it, of course.

Thank you very much. If you have any more questions, come on up and ask.

(Applause.)

EVOLVING AND EXPANDING ROLE OF VETERANS BENEFITS JURISPRUDENCE OF THE FEDERAL CIRCUIT.

Moderated by Mr. Jeffery Luthi

MR. LUTHI: Well, folks, since you are all anxious, I think we'll go ahead and start, although we are starting a few minutes early. We're about six minutes early.

My name is Jeff Luthi. I'm an attorney with the Court's Central Legal Staff. And it's my privilege this morning to introduce our panel.

I only have one request. If any of you ask a question of the panel, for purposes of the court reporter, please state your name, and if you have an odd last name or difficult last name, please spell it. That would assist the court reporter in transcribing this session.

We're also expecting an easel, so there will be one slight interruption once we get started.

It's my privilege this morning to introduce the panel to you. I'll introduce them in the order that they will speak.

Our first speaker will be Professor Jim O'Reilly, who is a professor of law at the University of Cincinnati. He concentrates in administrative law and teaches other courses, also.

He will be followed by Dick Hipolit, who is Deputy Assistant General Counsel with the Department of Veterans Affairs. His duties include litigation before the Federal Circuit.

Following Mr. Hipolit will be Todd Hughes from the Department of Justice. He's the Assistant Director of the Commercial Litigation Branch in the Civil Division.

Our last speaker today will be Mr. Ron Flagg, who is a partner of Sidley & Austin, functioning in the Commercial Administrative Division.

Mr. O'Reilly.

PROFESSOR O'REILLY: Thank you, Jeff. "I come to bury Caesar, not to praise him."

That dramatic line from an important character in Shakespeare's most important military play, Julius Caesar, is about autocracy of the power of autocracy.

As a long time scholar of efficient administrative law systems, I come to you today to bury the deficiencies in the Veterans Appeals process, with full military honors, of course, and to urge the new administration and its transition teams to replace the Board of Veterans' Appeals, and replace the Court of Appeals for Veterans Claims, with a better functioning Federal administrative appeals system for the five Federal disability schemes--burying what we see in the appeals process today, and emerging with a single merged Federal disability appeals process, using independent Administrative Law Judges. This takes the Federal Circuit, the topic of our panel, out of the process and replaces it with a streamlined system that makes the veteran feel that cases will be heard independently and adjudicated quite fairly.

In terms of the Office of Management and Budget, and the discretionary domestic budget, this can be done and should be done under the Reorganization Act with supporting legislation.

It is a target for cost savings. It is a systems change. It is a paperwork transaction cost reduction.

The message from the VA's website, at page "Scoreboard FY '99," is that it takes the veteran an average of 745 days to get the conclusion of his or her appeal.

So we're telling the aged veteran, the Filipino scout who had fought on Bataan, we are telling him come back October 3rd, 2002, if you're still alive, and we will let you know the outcome of your appeal. That's on average.

I believe that system is broken and I believe it should be merged into the procedural regularity of other judicial systems which do so much better.

I do not say we should give up the preferences on the substance of medical and causation criteria which favor the benefits applicant. Rather, we need to merge how we view claim disputes on disability, generally, so that a sense of procedural fairness can be restored.

We should keep the specific presumptions. We should keep and enhance the duty to assist, but we should do away with the parts of the system that really fail and that put an impenetrable set of traps in front of the veteran.

I believe that radical change is coming because of the transaction cost being driven out of government by Vice President Gore's reorganization project, by Governor Bush's Texas state administrative restructuring. And as these are replaced with a single streamlined disability system, using independent Administrative Law Judges, the system that we now have in place will be replaced.

The Federal Circuit, in the *Tallman* opinion, spoke with the analogy of "implosion," and I go the other way. Instead of being the typical law professor who will say, "marginal incremental process adjustments are optimal," and many of you have heard that in law school, I would call, as my fellow veteran said, those that carried satchel charges with me, "Fire in the hole."

Let's blow up a system that doesn't work, and let's look specifically at what we can replace that system with, that will streamline the system.

Now, having started out on such an upbeat note, I may have turned off many of you.

(Laughter.)

PROFESSOR O'REILLY: I recognize that and I could have given you the boring administrative law lecture, going over exhaustion, rightness, and the like, and that's why I put the detailed paper on the table in the back. It's going to be a 45-page article in the Administrative Law Review's winter issue; I could have bored you to death with it.

But I'd rather talk about the perspective I got yesterday, feeling the name of my friend Carmine Angelo Macedonio engraved in the Vietnam Veterans Memorial, and looking at the people who were with me, the veterans who were with me, and asking, are they getting justice? Those that were wounded, are they getting justice?

Now, I'll step back in the law professor role and I'll quote the former Cornell Law Dean, Roger Crampton, who said that it's important that an administrative system have accuracy, efficiency, and acceptability. These are the goals of good administrative procedure.

But listen to Crampton's words: "Acceptability emphasizes the indispensable virtue of procedures that are considered fair by those whom they affect, as well as by the general public. The authority of decisions in a society resting on the consent of the governed is based on their general acceptability."

Is the continuing remand pattern, what somebody described to me as the "hamster wheel for veterans," a fair system? The core problem is that, as one of the judges of the CAVC has said, "Actual decisions on the merits are very rare." The Federal Circuit, in turn, tolerates endless remands, as in the *Colucci* case, in which the file was ready and complete, but the VA wanted a remand to further stall and to oppose the reward of benefits.

Let us ask, through this revision of the system, to have courts reach a decision by merging the systems and coming to a more rational approach.

I also believe that the young House Budget Committee and Senate Government Affairs Committee staff members to whom we can communicate this need for change would benefit by a look into the system, trimming out some of this recycling, avoiding rework and recycling. And I believe the merger would be a wonderful achievement from the point of view of reducing government's rework.

The individual claimant would see this as a wonderful achievement because they now feel stuck in a bizarre netherworld of the VA regional offices' incompetence in handling the files; the Board of Veterans' Appeals' intransigence in considering the duty to assist; and the inscrutability and inconsistency of the court system.

It makes sense to convert this mess into a subset of an administrative adjudicative system similar to the Social Security system, and to let the Federal Circuit return to its important role in patent and intellectual property laws.

Now, you may have noticed that, as a veteran having been drafted in 1970, I probably have a different perspective than my brethren from World War II and Korea. We didn't come back to wonderful parades. We are the demographic bulge that has come into the VA now, and will be coming more and more as we age. And we're coming to the VA saying, "We are not going to put up with it."

Wouldn't this have manifested itself as structural reform? Looking at the appeal process, it is the individual being denied, not just the sheet of paper or not just the C file.

And so fairness and clarity are critical values for this group of individuals who seem to have benefitted greatly by the GI Bill, who seem to have benefitted greatly by their educational benefits, and they ask, "Why 745 days?" Why is 745 days (from the VA's website) the length of the average appeal process?

Maybe ABC News 20/20 was correct. Maybe there are systemic flaws at VA. But maybe it will take the reinventers from the Gore campaign or the Texas budget slashers from the Bush campaign who need to come in as a new Administration and change the system.

One of the joys I had as the Chair of the American Bar Association's Section of Administrative Law was to greet delegations from other countries and take them around and talk to them about the U.S. administrative system, particularly those from Third World nations in Eastern Europe.

I talked to them about EPA, talked about rules of practice, to the Labor Department for rules of evidence, to the FCC for competitive licensure, and to the Labor Department, to the Social Security grids.

But I would not take them to the VA. No sensible nation would have created the system we now have, in which veterans' appeals are so significantly difficult for the individual veteran to pursue. It really does take an autocratic system like Serbia's to understand the VA system.

Even the Serbians might have difficulty with our system because we are not providing the individual a clear and systemic approach that honors or values his or her service.

I believe ultimately the Federal Circuit has to take action before the Congress or the Administration does it. The Federal Circuit is starting to try to bring the CAVC jurisprudence into line with Federal administrative law.

The September 8th *Dambach* opinion signals some change, some end to the recycle and remand "hamster wheel," as it has been called.

The Federal Circuit sometimes gets distracted, as with the subsumption cases, which I believe are absurd.

The Federal Circuit, though, needs to do what it says in *Nolan*. It needs to look for "fundamental principles of fairness." It scolded the CAVC in the *Nolan* case, because the CAVC had reopened a threshold issue that had been conceded. The debates within the CAVC opinions went on for some time, and the Circuit criticized the complete surprise of what the CAVC had done.

This is a good case, *Nolan*, of the Article III court stepping in and taking control of the Article I tribunal's outcomes, and holding that the CAVC should not even have reached an issue on which the substance was waived.

Let's ask, is it productive to continue to have a Court of Appeals for Veterans Claims that gets "dissed" in the way that the Federal Circuit has dissed this court? Maybe the 1988 experiment has proven to be too little due process for too many veterans.

Again, I expect that merger is going to occur, but for now, the greatest contribution the Federal Circuit could make, is to impose the Administrative Procedure Act at every turn on the veterans bureaucracy, and to ask those who are so badly handling claim files in the regional offices to do it better, or do it not at all in view of the benefit.

In the paper, I've given you the major doctrines, exhaustion, rightness, deference and the like, and I won't go through those now.

I will say that there is a real concern on my part, as an administrative law scholar, that the agency is so badly doing its work, that the Board of Veterans' Appeals is so badly doing its work, the Court of Appeals is not giving effective review, but it is the role of the Federal Circuit to step in and do something.

I'm particularly disturbed by the Federal Circuit's *Cole v. West* decision in holding that the Court of Appeals for Veterans' Claims remand decisions are not appealable orders.
I believe that the veteran gets on the carousel and gets a remand, and it's been mishandled, it comes back up on remand, and the veteran has a sense as with my client John Donovan, that there is no justice, that the system is simply recycling.

This is, in physics terms, a centrifugal force without anything to pull out a decision. The September 8th *Dambach* decision shows that the remand cycle could be stopped. The Federal Circuit should go one more step and require that things be stopped.

Why couldn't the Federal Circuit or other Article III court use their power to oversee the VA, to force it to act competently, to force it to act fairly, or to hold the VA in contempt when so many Federal courts have fixed the oddities in state procedures, have fixed prison systems or dysfunctional school systems, or even the Teamsters Union?

Where is the Article III appellate judge to protect the veteran whose claim has been waived? Where is the Frank Johnson? Where is the John Minor Wisdom? Where is the Robert Mehrige that we need to stand up for veterans and impose due process on a very flawed system?

It is not an answer for judges to simply say, "That's for Congress to decide. It's not my role." Each of the Federal Circuit judges gave up a lucrative private practice or other significant situation to come in and do the work that the Federal Circuit's Article III judges are sworn to do.

I would ask them to focus, as the Supreme Court did in *Abbott Laboratories*, on issues of fairness, the hardship to the person being affected if justice is delayed. We should take those cases out of the Federal Circuit and impose Article III standards of due process on the system.

I do have to acknowledge, that it's not the judges' fault. The system, in this statutory language, does slant against an individual desire of the judge to force a clear and timely decision.

But we have a system that slowly and inexorably creates more paper in a file. The 745 days of average delay are not excusable simply by saying, "The statute requires us to do so."

I believe there is a duty to assist, not a duty to resist, and that's what the veterans are seeing today.

In the course of Congressional hearings in the future on legislation, I would expect that the question of fairness and justice would be asked of the individuals, that the judges of the Court of Appeals for Veterans Claims, the Board of Veterans' Appeals and the VA Secretary himself, would

be asked about the fairness and justice of our continuing cycle of re-looking at claims this way.

Some of the veterans, such as Jack Morton, who dies waiting for resolution of his claim, are given a sense that the system has individually given fair justice. I believe the best fix is ultimately to scrap that system and give independent Administrative Law Judges the kind of systemic approach that they have within the Social Security system.

A good place to do it would be in adopting a system that does not remand, that simply looks at the merits and disposes of the cases, rather than as that movie, "Groundhog Day," when you wake up and your file is back and your file is back, and your file is back, each time.

What's going on here? The system is broken. With help from my student research assistants, I have been reading a lot of CAVC cases and Federal Circuit cases, doing a comparative study with the Social Security system, examining it, and the like. I find that the present CAVC lacks the force to hold the VA regional offices accountable where the problems really are significant.

The French writer, Anatole France, said with a dose of cynicism, that, "The law, in its wisdom and majesty, permits both the rich and the poor to sleep under bridges." That's a pretty cynical approach for France, but we're looking at the 80-year-old, Filipino Scout, in Manila, asking for justice but filing late and being dismissed, and the bureaucraton Vermont Avenue in Washington being given lots of time and lots of opportunities to recycle the files.

So I perceive an attitude in which the recycling of files is somehow deemed desirable, while the unrepresented and the old soldier is turned away.

I believe that the Supreme Court's *Sims* case should not have been limited by the Federal Circuit's *Belcher* opinion, and I believe the Federal Circuit needs to remove the barrier that it applied in the Belcher case to exhaust remedies.

I've got five very quick suggestions to those of you from veterans service organizations. First, do as I have done. Contact the staff who are working on the Presidential campaigns and talk to them about the policy issues involved here, and how this is a significant deprivation of veterans' rights. Veterans vote, and this is the month to get their attention.

So if you're in an organization that's involved in the veterans' service process, tell the people in the Administration who will be the transition staffs that you want the Reorganization Act used to change this system.

Second suggestion: Tell Congress that the remand system unduly and unfairly prolongs the needs of the veteran to receive a fair outcome. The constraining language in Title 38 should be removed. The VA, BVA and the CAVC system should be changed. The shuttle of remanded case files is off the track.

How should Congress remedy it? With a hammer. Give the VA, and the BVA a specific time limit, and give them a particular amount of money as their appropriation. If they don't act within the time limit, they've got to give the veteran benefits.

If they had to give the veteran benefits, for failing to meet the time limit, I can guarantee you the effect would be like it was on EPA and on FDA. A provisional "hammer" that is based on time limits gets the agency's attention. What happens in other agencies is that people pay attention to deadlines when there's an appropriation behind it, or a "deemed accepted" license behind it. That's what happens.

I don't believe H.R.4864 in the House goes far enough. I believe that 4864, in its standard of whether the VA regional office action was fatally flawed at the time it was made, reminds me of Stonehenge. It reminds me of the analogh that one day a year, the light comes through the circle, and you've got "clear and unmistakable evidence" of failure. That is too extreme a standard for the individual veteran who wants to get judicial review. So I thought about it in terms of people who were in my platoon, the average 18-year-old recruit, and I would like to ask that person, "If you got hurt and the VA screws up your file, what is the standard of review in the *Skinner* case?" The standard of review is the CAVC will not change the error made below, unless the decision of the Board of Veterans' Appeals was arbitrary, at the time that the Board of Veterans'Appeals decided that there had not been a clear error.

Friends, this is a system where a lot of people come in without representation. The *Skinner* decision and the standard of review is impenetrable to the average 18-year old recruit or the 68-year-old veteran.

Another option is to do the carrot and the stick approach. Take the Veterans' Administration Miscellaneous budget, which I believe is $1.3 billion for the Secretary of the Department, BVA, and the like, and say, "Fine. Here are the milestones. You make the milestone, you get a little bit more money. If you're substantially behind the milestones, you lose the Secretary's travel budget. You lose the SES bonuses. You lose in-grade promotions." How about trying the carrot and the stick financial incentives for meeting deadlines?

Fourth, if the three first suggestions fall on deaf ears (and you're entitled to feel quite differently, of course), what about sending lawyers to look at the background of the key VA regulations?

The VA's regulations are particularly vulnerable because the agency has not followed the Administrative Procedure Act in some of the background stages of its rules. And I'll tell you, if the EPA and the FDA had used the VA's approach to rule-making, there would have been significantly less pollution regulation, significantly less FDA regulation.

The veteran service organizations can attack, and should attack, those regulations that did not comply with the Administrative Procedure Act.

In looking at the August 11th decision of the Mortgage Investors case in the Federal Circuit, there's a blueprint for attacking regulations of the VA.

Now, I'm running short of time, so I'll get to my last suggestion. The veterans' bar should ask the Federal Circuit to step in and exercise its mandamus jurisdiction, using the *Dambach* case as a principle. The order in *Dambach* from the Federal Circuit was, "You will make a decision by this time or you'll pay the benefits."

Look specifically at that kind of a remedy. If the *Cole* decision is reversed, for example, and rethought, I believe the CAVC could be told by the Federal Circuit to justify each of the remands when CAVC remands, as opposed to making an actual decision.

If, as the CAVC judge has said, actual decisions are very rare, the Federal Circuit can say, "Why? Why *not* come to a conclusion?"

This might be simply an academic view of the cure for delay, but mandamus is one of the viable remedies in which Article III judges can step in and promote justice.

The Federal Circuit can act directly. We need to raise all the issues of law. The CAVC should get the mandamus from the Federal Circuit and start looking specifically at the problem of the perpetual "hamster wheel" of remand. If not, the Federal Circuit should step in and appoint a Special Master, such as was done with the Teamsters, with schools, and with other intractable problems. I see no less recalcitrance in the system when I talk to veterans, than those cases in which Special Masters have been appointed in the past.

I do not intend a personal criticism of the work of anyone from the lowest to the highest in the system. But I do feel that Carmine Macedonio and his platoon mates are not well served by the system of remand.

I do believe that the five optional suggested alternatives would induce discipline, and maybe even panic at some level of the system, but a little bit of discipline to get the cases resolved makes a difference.

If there were a visiting foreign delegation to come in the future, I would like to show off a veterans system that works. I would like to show off to people from another country a veterans system that truly respects and honors the veteran.

Not all claims are valid. Not all claims should be granted. But we would benefit by giving veterans a sense that an independent Administrative Law Judge within 75 miles of your home has heard your evidence in person, and considered your case, and then, if you have a strong disagreement, you'll ultimately be in the U.S. District Court close to your home.

You will get a sense of justice from the U.S. Magistrate, and from the independent Administrative Law Judge, that you don't now get 745 days after you make your claim.

Well, thank you, very much for giving me the time for this. I realize there are strong views from other sides, and I would like now to pass it on to other panels. Thank you.

(Applause.)

MR. HIPOLIT: I'm Dick Hipolit, Deputy Assistant General Counsel for VA.

What I wanted to do is give kind of an overview of what I see as some developments in the Federal Circuit jurisprudence and speak of a couple of specific areas of interest to VA from our

perspective. The Federal Circuit's role in veterans' benefits matters has evolved considerably since the Veterans' Judicial Review Act took effect in September of 1989.

It was 1991 when we first started getting reported decisions from the Federal Circuit in veterans' cases, and the first reported decisions in 1991 exclusively involved jurisdictional issues relating to either CAVC or Federal Circuit jurisdiction.

Subsequently, jurisdictional limitations were still routinely discussed and applied, but the decisions started to reach the merits more after that.

There weren't many decisions though. For the five-year period 1992 through 1996, there were only about 10 merits decisions that came out of the reported decisions of the Federal Circuit in appeals from the CAVC.

A big change occurred around 1997 with many more merits decisions coming out. I think a lot of that was due to increased attorney involvement in the cases. The attorneys were better able to identify and frame legal issues for review.

There's been a greatly increased volume of Federal Circuit litigation and appeals from CAVC in the last two years. In fiscal year 1999, our work load doubled from the previous year in Federal Circuit cases, and this year, we're seeing a drastic increase, as well.

Despite the increase in veterans' cases before the Federal Circuit, there has been little use of the direct review under 38 U.S.C. Section 502, which allows the Court to directly review actions of the Secretary. The appeals can be taken directly to the Federal Circuit.

Probably one reason that that hasn't been used a lot is the Federal Circuit Rule 47.12, which indicates that you must file your petition for review within 60 days of the challenged action.

However, there has been some rise in the use of 502 appeals lately. I think the first decision in a Section 502 direct review case was in 1994, the *LeFevre* decision, where there was an unsuccessful challenge to an action by VA in deciding not to establish presumptions of service connection for certain diseases as a result of herbicide exposure.

Subsequent actions under Section 502 have been filed, involving challenges to VA rule-making action, VA General Counsel precedent opinions, and to internal VA memoranda and letters.

Although settlements were reached in a couple of cases, I think the first favorable decision for a petitioner under Section 502, was this year in the *Splane* case, where a portion of a General Counsel precedent opinion concerning service connection by reason of aggravation was overturned.

It remains to be seen whether the *Splane* decision may encourage additional efforts to seek direct review under Section 502.

I think the trend in the Federal Circuit's more recent decisions has been decidedly pro-claimant, and I think since Chief Judge Robert Mayer entered his position in December, 1997, the court has

taken a more activist pro-claimant approach.

The Federal Circuit's *Epps* decision, which has been the subject of a lot of criticism from veterans, was rendered in October '97, when Chief Judge Archer was still in that position.

Beginning in February 1998 with the *Collaro* decision and continuing later that year with *Bailey*, both of which were authored by Chief Judge Mayer, I think has been more of a pro-claimant trend.

The recent decision in *Dambach* and the dissent in *Somers* by Judge Mayer indicate his fervor for veterans' issues has not diminished.

Also, recently, Judge Plager has authored several very pro-claimant decisions critical of the CAVC, particularly *Hensley*, *Winters* and *Nolen*.

The Federal Circuit decisions of late have included numerous references to the non-adversarial process for veterans' claims, the paternalistic nature of the claim process, the uniquely pro-claimant system, and the need to maintain fairness in the adjudication of claims.

On the other hand, the court has indicated in a couple of cases that the generous spirit that suffuses the law cannot be used to override the clear meaning of particular statutory or regulatory provisions.

The Federal Circuit has specifically disavowed any authority to rewrite statutes and regulations. Nevertheless, the Court has shown an inclination to depart from the strict terms of statutes and regulations, when necessary to provide fairness, particularly when necessary to correct actions by the VA which the Court felt were inconsistent with the pro-claimant adjudication process.

In *Hayre*, for example, the Court departed from statutory and regulatory rules governing finality of claim decisions in order to correct what it considered a grave violation of the VA's duty to assist in claim development.

In *Bailey*, the Court recognized that the statutory deadline for appealing from BVA to the CAVC may be tolled on equitable grounds in a case that involved conduct by a VA employee which caused the veteran to miss a filing deadline.

In *Linville*, the Court extended application of a postmark rule to filings of motions for reconsideration with the Board of Veterans' Appeals for purposes of tolling the appeals period to the CAVC, although the Board's regulations did not provide a postmark rule applicable in that situation.

In *Dambach*, the Court suggested to the CAVC that it set deadlines for action on remands. In *Hayre* and *Dambach*, the Court indicated a willingness to apply its jurisdiction expansively to provide relief to veterans perceived as having been harmed by VA actions.

The Federal Circuit has also shown a willingness on occasion to address issues or reach conclusions that were not directly presented by the parties. In *Hayre*, the Court acted on its own to create a finality exception, based on grave procedural error, when the issues argued before the Court involved clear and unmistakable error.

In *Yates*, the Court endorsed the Board of Veterans' Appeals' clear and unmistakable error regulations, although that case involved an allegation of CUE by the regional office.

In *Epps*, the Court adopted the well-grounded claim criteria established by the CAVC in *Caluza*, although the government had argued only in support of the CAVC's sequential obligation interpretation of Section 5107(a).

In contrast, in the *Haywood* case, the Court remanded a legal issue which it could have considered de novo, where it felt that the CAVC should apply its expertise in the first instance to consider the issue.

Several Federal Circuit decisions in recent years have had significant or potentially significant implications for VA, and I'd like to mention a couple of those.

One of particular potential significance,was the *Hayre* case, where the Court departed from finality principles.

In *Routon*, a previous decision, the Federal Circuit had taken note of the rules of finality of claims decisions in statutes and regulations governing veterans' benefits.

Nonetheless, in *Hayre*, the Court sua sponte created a new finality exception, holding that the finality of a VA regional office adjudication was vitiated due to grave procedural error involving VA's duty to assist in claim development.

Specifically, the Court held that where VA made only a single request for service medical records specifically identified by the claimant and not obtained by VA, and VA failed to notify the veteran of the failure to obtain the records, the resulting unappealed claim decision could not be considered final and the claim would be considered to remain open for purposes of further action.

The scope of *Hayre*'s impact is not yet clear. Claimants' representatives are arguing, subsequent to *Hayre*, that any failure of the duty to assist on VA's part vitiates the finality of a regional office decision.

Such an interpretation would potentially increase VA's workload substantially, since it would have to redevelop and readjudicate a large number of old claims. However, the CAVC has shown an inclination to put some limitations on the *Hayre* doctrine.

In *Hurd*, the CAVC observed that the Federal Circuit in *Hayre* did not hold that all violations in the duty to assist are of such a grave nature that they would render a claim decision non-final.

Similarly, in *Simmons*, the CAVC concluded that *Hayre* does not require VA decisions to be considered non-final due to what it characterized as "garden-variety" breach of the duty to assist.

The Court found that the application of the *Hayre* principle should be reserved for instances of grave procedural error that may deprive a claimant of a fair opportunity to receive entitlements.

Alternatively, in that decision, they characterized the *Hayre* principle as applying to actions that seriously impair a claimant's opportunity to be awarded benefits.

In so holding, the CAVC emphasized three elements in the *Hayre* analysis: one, that there had been documents that were specifically requested by the claimant; two, that in *Hayre*, there was absence of notice to the claimant of VA's failure to obtain the documents; and, three, that the Court had emphasized the particular importance of service medical records, which were the documents at issue in *Hayre*.

In a single judge decision in *Tetro*, the CAVC cited *Hayre* in finding that the finality of an RO decision was vitiated by the failure of VA to obtain certain Social Security Administration records. However, the CAVC granted reconsideration in that case and held over a strong dissent by Judge Kramer that the breach of the duty in that case did not rise to the level of a grave procedural error.

The Court indicated its reluctance to read *Hayre* expansively because it involved a judicially created exception to statutorily mandated rules of finality. As yet, the Federal Circuit has not had the opportunity to weigh in and review the CAVC's application in the *Hayre* principle.

Another area of great interest to VA is the recent Federal Circuit decisions casting doubt on the CAVC's use of harmless error principles. Restriction on use of harmless error might be of significance to VA because the CAVC would be required to remand a large number of cases that are seemingly meritless to the Board.

Section 7261(b) of Title 38 U.S. Code specifically directs the CAVC to take due account of the rule of prejudicial error. Nonetheless, in *Winters*, the Federal Circuit rejected the CAVC's reliance on harmless error. In that case, the CAVC had found that the BVA committed harmless error by applying the wrong standard to a new and material evidence determination, because, assuming that new and material evidence had been presented, the claim was not well grounded anyway.

The Federal Circuit said that the case should have been remanded for consideration of the proper new and material evidence standard and that the harmless error rule could not be used to decide a matter assigned by statute to VA, that is, the issue of reopening.

Shortly thereafter, in *Nolen*, the Federal Circuit stated that the harmless error rule has no application when the well groundedness of a claim is at issue.

The Federal Circuit's action in these cases apparently was based, at least in part, on the conclusion that the CAVC as an appellate body was not authorized to make de novo factual determinations per the Federal Circuit's decision in *Hensley*, and that such determinations were inherent in the harmless error determinations at issue in that case. Also, the Federal Circuit's displeasure with the CAVC's application of well groundedness principles may have been a factor.

In a recent single judge decision in *McHenry*, Judge Holdaway of the CAVC expressed his concern that the Federal Circuit's action in *Hensley*, *Winters* and *Nolen* has essentially prohibited the CAVC from considering the harmless error rule.

Although *Hensley* did not specifically address harmless error, Judge Holdaway reads that decision, which held that the CAVC is not authorized to make findings of fact, as precluding the CAVC's use of the harmless error rule, since harmless error determinations inherently involve fact finding.

Judge Holdaway expressed concern that all cases where any factual finding of the BVA is erroneous will now have to be remanded for readjudication, thereby increasing VA's workload and lengthening delays without the prospect of additional benefits.

Harmless error does not appear to be completely dead, however. The CAVC's recent decision in *Claudus Smith* is a good example of a harmless error case not involving factual determinations. In that case, the veteran claimed interest on past due benefits, and the BVA found no jurisdiction to hear the issue.

The CAVC found that the Board erred in declining jurisdiction but found that the error was harmless because the veteran was not entitled to interest as a matter of law. That would seem to be a decision which would not run afoul of the recent Federal Circuit decisions because the CAVC was not making factual findings.

A recent decision in *Summers* by the Federal Circuit affirmed the finding by the CAVC that any failure by the Board to consider a regulation which allegedly created an exception to the medical nexus requirement for well groundedness was harmless since the claim was not well grounded.

Now, the Federal Circuit's reasoning is a little unclear in that case since, seemingly, if the regulation did, in fact, create an exception to medical nexus, this would have a bearing on the well groundedness determination.

Presumably, however, the Federal Circuit meant to say that the failure of the Board to consider the regulation was harmless, since the regulation did not create an exception to medical nexus as a matter of law. That would be consistent, I think, with their findings in other cases.

Since many harmless error issues appear to involve factual matters or application of the law to the facts of a particular case to some degree, we will be watching closely to see what impact results from these decisions.

I want to just briefly mention, also, the issue of well groundedness. I know one of my colleagues is going to be discussing that in more detail later.

I wanted to comment that the Federal Circuit has shown an inclination to back away from strict application of that *Epps* principle in some of the more recent cases, particularly in *Hensley*, where although the Court declined to revisit *Epps*, it emphasized that the well-grounded claim threshold is necessarily a uniquely low one, designed to screen out claims that are totally lacking in merit.

The Court reemphasized the statements in *Epps* that a claimant need only have a plausible claim or a claim capable of substantiation to be well grounded.

In *Hensley*, the Court also reemphasized the use of medical treatise evidence to create a nexus for purposes of well groundedness.

A subsequent Federal Circuit unpublished decision in *Giles* followed *Hensley* in characterizing the well-grounded claim threshold as low.

In *Schroeder*, the Court held that if a claim for a particular disability is well grounded under any theory, VA has a duty to assist on all possible causes of the disability, even those unknown to the claimant.

In *Nolen*, the Federal Circuit indicated that the CAVC could not overturn a finding that the claim is well grounded.

Most notably, recently, the Federal Circuit indicated in *Brock* that it was granting a petition for rehearing to reevaluate the *Epps* situation and the whole issue of well groundedness. Congress may intervene, however, before the Court reaches that issue.

I'd like to now turn the floor over to my colleague to get the Department of Justice perspective from Todd Hughes.

(Applause.)

MR. HUGHES: I'm Todd Hughes from the Department of Justice.

Can you all hear me back there? Okay. Tell me. I tend to drop my voice, so if I do, tell me to speak up. First, I have to make clear that what I say here are my own opinions, and not the division of the Department of Justice. I'm going to focus -- I'm going to keep my remarks short because Dick covered a lot of what I would have to say, and I'm also going to focus my remarks more specifically on how the evolving Federal Circuit jurisprudence on veterans' benefit has impacted the Department of Justice and our litigation at the Federal Circuit.

In my capacity as an Assistant Director in the Commercial Litigation Branch, which handles all of the VA appeals to the Federal Circuit, it's become very clear to me that the amount of appeals decided by the court on the merits and heard by the court on the merits has increased dramatically in the last couple of years.

When I first started at the Department several years ago, very few cases were argued on the merits, and almost all of them were dismissed on standard jurisdictional grounds.

I don't have any specific numbers for you, but I would guess that when I first started, maybe a handful of cases a year were heard at oral argument, and now we hear as many as ten a month on the merits. There's just been a dramatic increase by the Federal Circuit in its VA cases.

Given this increased involvement by the Federal Circuit, I want to ask and suggest answers to a couple of questions. First, why this great increase in the number of cases being heard on the merits, and how has that affected veterans' benefit law, and more specifically, what I want to talk about is

how has it affected the Department of Justice.

First, for the why, I think there are two primary reasons here. The first, as Dick alluded to, is simply the aging Statute itself. We're now getting to a point where the VA and the veterans' court is issuing a number of merit decisions interpreting statutes and regulations, and also the veterans' bar is bringing cases to the court that are suitable for the Federal Circuit to hear.

In fact, I'd really like to applaud the veterans' bar for bringing these cases and becoming much more sophisticated in the number of cases they bring to the Federal Circuit on the merit because I think it's very important for all of us, on the government side and on the veterans side, to have clear and definitive interpretations of the statutes and the regulations that the VA applies. And that's the result -- or that's what happens when we get these merit decisions from the Federal Circuit.

So that's basically the why. On to my second question of how has this affected specifically the Department of Justice.

Beyond the great increase of my office's workload, and it really has got to the point where now, the VA appeals are the vast majority of our appeals in the Federal Circuit, I would really say that the Federal Circuit's jurisprudence hasn't affected us all that much.

What the Federal Circuit has done has clarified the boundaries between it and the Veterans Board and what it can decide in the Veterans Board to decide. But it hasn't, as I feared for a couple of years, expanded its own jurisdiction over veterans' cases. It simply hears more because of the number of cases getting to it.

And I'd like to give you just a couple of brief examples of what I mean by that, and the first example I've used is the *Bailey* case, in which the Court concluded that the equitable toll in principle was applicable to the time for appeal from the BVA to the veterans court.

Now, that case was troubling to us at the Department of Justice at first because it seemed very unprecedented, and to stray from a well grounded precedent regarding times for appeal.

And although I'm not sure I still necessarily agree with the opinion, and I think Judge Bryson had a very good dissent, it hasn't had the impact on our litigation in the Federal Circuit that we thought it might have, right? In fact, the Federal Circuit has made it very clear that it's not going to review specific applications of that tolling doctrine in particular cases.

Recently, in the *Leonard* case, I think, they said that equitable tolling, as it's decided on a case by case basis, is an application of the law to the facts, which is just not appropriate for the Federal Circuit.

So the *Bailey* case, while it was, perhaps, disconcerting to us at first, really hasn't resulted in any increase in the Federal Circuit's jurisdiction or in the workload of my office, or in the ways in which my office has handled our appeals at the Federal Circuit.

But as they've done in both of those cases, they have drawn the line, like they did with the *Bailey*

case, at reviewing the application of the EAJA Statute to the facts of the particular case, and this is important because a lot of the cases involve the question of substantial justification of the government's position.

MALE VOICE: You're steadily dropping.

MR. HUGHES: Okay. Sorry about that. I talked about the EAJA cases, and I think it's important the Federal Circuit has done a very good job of pointing out that, well, it has the power to interpret the EAJA Statute. It has also been very steadfast in eliminating its jurisdiction to that interpretation, and not reaching the more factual based discussions of whether the government was substantially justified in a particular case or not.

And, again, I think the Federal Circuit has done a good job there of recognizing its own limited jurisdiction, and not impinging upon the jurisdiction of the veterans' court and the Board of Veterans' Appeals, which are the appropriate entities to decide the substantial justification question.

So those are the two examples I use as the Federal Circuit doing a great job of interpreting statutes and regulations in a way that sets in lines in a clear fashion for everybody to understand, but not overstepping its jurisdiction -- its limited jurisdiction.

On the other hand, I'd like to discuss the *Hayre* case a little bit. Dick's already discussed it, but I'd like to discuss it a little bit from my perspective at the Department of Justice, because I think that it has somewhat troubling implications, although perhaps, as with *Bailey* and the EAJA cases, it may not prove so troubling in practical result. But it does have some troubling implications for us at the Department of Justice as to how the *Hayre* case is going to be used at the Federal Circuit.

And I think that the most troubling aspect to me is how is the court, the Federal Circuit, going to review questions involving grave procedural error, and what standard of review, if any, applies to whether the Federal Circuit can determine whether a grave procedural error occurred in each case.

I don't think I have the answer to that question, although perhaps it will come along the same lines as it has in all the other cases, in that the Federal Circuit will recognize that a grave procedural error may disturb the finality of a final VA decision, but that the Federal Circuit does possess a jurisdiction itself to determine what is a grave procedural error.

I suspect that that may be the position that we take at the Department of Justice, but I'm not sure. I think *Hayre* does provide a very difficult case for us, and one that we'll look at in the future.

And, finally, since Professor O'Reilly discussed it, I would also like to just mention that the recent *Dambach* case, I don't have any particular quarrels with the merits of the decision, but I do find perhaps in opposition to Professor O'Reilly's dicta in the *Dambach* decision somewhat disturbing.

And I'm speaking there of Judge Mayer's observations that it seemed that the evidence there was enough to support a claim, and also of his observation that perhaps the VA should set a time limit.

Those kind of observations are clearly outside of the Federal Circuit's jurisdiction, and the Court

recognized that in its opinion. But it disturbs me a little when the Court makes those observations because it seems to me that their only real intent must be to tell the veterans' court how to do its job.

And that seems to me just inappropriate because it's not within the jurisdiction, and it's not of the Federal Circuit, and it's not what Congress intended.

So in sum, I don't think I have any definite trends to note for you. But I think, in whole, the Federal Circuit has done a very good job of recognizing its limited jurisdiction, interpreting statutes and regulations, but holding off on overreaching and usurping of the Board of Appeals for Veterans Claims.

(Applause.)

MR. FLAGG: My name is Ron Flagg. I feel a little embarrassed. It's pretty obvious why my colleagues are here on this panel, and you're probably all scratching your head and wondering why I'm on the panel, so I'll take five seconds to introduce myself.

My firm and myself have worked frequently with the National Veterans Legal Services Program, including representing Mr. Epps in what turned out to be an unsuccessful attempt to get the Supreme Court to take his case, and more recent, somewhat more successful attempt to get the Federal Circuit to rehear the *Epps* case and the *Brock* case, in which we're counsel, as well.

And so I will try to focus my remarks today on the Federal Circuit jurisprudence in the area of the duty to assist and well groundedness.

There is some temptation, I suppose, any time you're the last speaker in a group of four, to try to tie things together, and I apologize to say that I can't resist that temptation.

Professor O'Reilly started out today, at least I think one of his last suggestions, short of Congressional action, was for the Federal Circuit judges to take a more active role in fixing the veterans' benefit appeals system.

We've heard a lot of references in the last few minutes to a series of cases in the last few months, and it's really quite extraordinary, because there are five or six cases just since May, in the well groundedness, duty to assist area in which, in every instance, the Federal Circuit has really cut back on the CAVC's jurisprudence in those areas.

The irony to me is that what I see the Federal Circuit doing, at this point, is having second thoughts about an area in which the CAVC originally took some initiative, and I'm sure the judges of that court took the initiative to make the system better. And they came up with this well groundedness theory.

I would say, again, you understand from what perspective I'm coming, I would say they came up with it almost on a whole clock, and we now see, a decade later, the Federal Circuit having endorsed that approach initially, having some second thoughts about it.

So I suppose when advocates advocate judicial activism, whether it's a good thing or a bad thing, depends on what judges are being active and what the results are.

I'm going to go over, and part of the reason I'm doing this is the thought of sitting here just talking to you scared me, so I thought I would try to enhance by presentation with some boards.

I apologize in advance because much of what I'm going to present is undoubtedly material that you know better than I do. Since the alternative was for me to sit here, I'll venture forth.

What I want to do is talk about how we got to where we are today in this area of the duty to assist and well groundedness, and where I'd like to start is back before the Veterans Judicial Review Act of 1988.

I think the Federal Circuit, and pretty much everybody else, agrees that Congress intended to codify existing practice in 1988 with respect to the duty to assist and well groundedness. So, at least logically, I think the first question ought to be what were people doing, what was the VA doing before 1988?

The best I can tell, and I've never heard anybody dispute this, the VA's approach, prior to 1988, was to assist all claimants for veterans' benefits.

Now, the type of assistance that would be rendered, obviously, would vary from case to case, but the theory was if you came in and you had an application that you wanted to file, or you had an application that was ready to file, the VA would help you. And there was no preliminary showing you had to make to get that sort of assistance.

Now, there are legions of statements by VA, General Counsel and others in VA, and I just picked up two of them that were readily available. Again, you could look at testimony from the seventies, the eighties.

This is from 1983, and the testimony of John Murphy, General Counsel, VA. And Mr. Murphy, before the House Subcommittee, says, "With the filing of the claim, the VA itself intends to garner and obtain the evidence for resolution of the claim.

"If the VA is not able to obtain all the evidence or there are other questions that arise, the veteran is requested to state any additional evidence that he wants."

There is no suggestion that before the VA helps the veteran, the veteran has to prove some substantial burden in his case. This is, I believe, oral testimony was written. The statement was quite similar.

VA adjudication procedures are not adversary in nature. In almost all cases, the claimant need do nothing more than file a claim. And, again, there's some discussion of how the agency proceeds.

But, again, there's never any reference that I've ever seen, prior to 1988, suggesting that a veteran needs to establish some sort of -- make some sort of evidentiary showing he's entitled to the

assistance of the VA.

Again, the VA itself didn't take that position, and obviously, that was the VA General Counsel speaking in a more formal way. The VA speaks to the public, and as through its regulation, this is 30A CFR, Section 3.103A, as it existed in 1988.

This is the official statement of VA policy at the time Congress passed the Judicial Review Act. "Proceedings before the VA are ex parte in nature. It is the obligation of the VA to assist the claimant in developing the facts pertinent to his claim, and to render a decision which grants him every benefit that can be supported in the law, while protecting the interest of the government.

"This principle and other provisions of the Statute apply to all claims for benefits and relief, and decisions thereon within the purview of this part."

It doesn't say anything about this principle applying only where you make some sort of threshold charge.

So that's where we are in 1988, and in 1988, Congress passes the Judicial Review Act. And central to the issue on focusing on Section 5107A and B, it's worth pausing in a couple of different places in this Statute on a title, which I've never seen anybody refer to, but there are two parts to the title, Burden of Proof, which refers to the Subsection A, Benefit of the Doubt, which refers to Subsection B.

I mean my understanding of burden of proof is burden of proof is something you have to establish in order to determine whether or not you win on the merits.

Now, the only burden of proof that I see in this Statute is the well groundedness standard. Again, you can't read it from the back. I think it's worth focusing on this Statute because this is from whence this controversy has sprung.

"A person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim."

Now, if I was higher tech, I would have this word, "such," flashing in red because, literally, the CAVC, the Federal Circuit, the VA and the Department of Justice, their entire interpretation historically of this Statute has been derived from the word, "such," although it's sort of a peculiar interpretation, again from my perspective of the word, "such," because what they say is, "The Secretary shall assist such a claimant."

But they say if that means not a claimant who has the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded, but such a claim refers to a claimant who has succeeded in carrying the burden of submitting evidence sufficient to justifiable need, et cetera.

Now, again, judges and courts have disagreed with us, but I don't think the Statute says that.

Also, not much attention has been paid to the third sentence of Subsection A. "Such assistance shall include requesting information described in Section 5106 of this panel." Section 5106 is the provision that says the VA should -- has the authority to get files from other agencies, such as, obviously, the military services.

This, I believe, is a very important sentence. In reality, this interpretation is in dispute here, and I'll get to that in a minute.

We have this Statute that is supposed to carry out existing practice in the VA as of 1988, and things lurch along.

The VA, I don't believe, in 1988 or '89 or 1990, thinks anything's changed. Here is the CFR provision from 1990, and it says, "Although it's the responsibility of any person filing a claim for benefit administered by the VA of an adequate and sufficient and justifiable nature, in a fair and partial language, if the claim is well grounded, the VA shall assist the claimant in developing the facts pertinent to his claim."

So, I mean the first clause is saying it's the person's responsibility -- the claimant's responsibility to prove their claim -- the merits of their claim by establishing that the claim is well grounded.

In the very same sentence, the next clause says the VA shall assist the claimant in developing the facts pertinent to his claim.

Now, again, I, for the life of me, can't understand how anybody can read into this the theory that the VA will only assist somebody who's already developed most of the facts pertinent to their claim, but that's what we ended up with.

Now, how did we get to -- yeah. That's probably the better one.

What happened after 1990? Did the VA change its mind and say, "Gee, you know, we thought about this from a policy perspective, and we need to allocate our resources. And the way we're going to allocate our resources is to assist only those who have, you know, sort of a plausible claim"?

No. That's not what happened. What happened, and I find this almost mind boggling, is the CAVC, on its own, in the *Gilbert* case in 1990, said that -- I think Dick alluded to it -- that there was a temporal order in here that, first, you had to establish that your claim was well grounded. That's sort of the first sentence here.

Second, you get assistance, because that's the second sentence. And the court, the CAVC said it again in the *Murphy* case a few months later.

Again, this was not something the VA was urging. It's something the CAVC came up with.

Again, I assume that it was -- it purports to be a statutory interpretation. I believe it sprung out of a belief on the court's part that that would lead to more efficient handling of claims. But whatever the motives, that's what happened.

Now, at first, and there's been some reference to this, the standard -- the well groundedness standard was not all that onerous. It was just -- the claim was plausible, at least standing by itself, is not all that onerous. And so not all that much happened, at least quickly, right after *Gilbert* and *Murphy*.

What really made a difference to this whole area of the law came with the *Caluza* case in 1995 when the well groundedness standard was fleshed out. And, all of a sudden, you went from just plausibility to a fairly hard set of criteria.

And it's, again, criteria I know you're all familiar with, but just to review them, a medical diagnosis disability, layer of medical evidence of a disease or injury in service, and medical evidence of a nexus between in-service injury or disease.

And that was adopted by the CAVC as what a veteran had to establish in the first instance before they were entitled to any assistance.

Now, again, coming with this, and I don't have anywhere near the experience in working with veterans or working in claims as most or maybe all of you. But just sort of intuitively, when I first dealt with the decision in *Epps* case, it just seemed a little odd to me that the VA would assist those people who had, in my mind, proven their claim because well groundedness is the burden of proof on the merits, as far as I'm concerned, and not render assistance to people who didn't have the wherewithal to establish their claims. So that was one problem.

Now, the other thing that I hadn't really focused on before, but I focused on more recently, is the assistance that Congress has mandated that a veteran get shall include requesting information, as described in Section 5106, and that's the provision that says, "VA, you can go to other agencies and get records."

Now, among the records, you know, veterans with a benefit claim might be interested in, would be his or her medical records. And so this is saying that the assistance shall include getting their medical records.

Well, the problem for a veteran today under this *Gilbert*, *Murphy*, *Caluza* standard is you can't get your medical records until you prove a medical diagnosis of current disability and medical evidence of a nexus between in-service injury or disease.

So the materials that are probably central to your claim aren't technically under this theory available to you until you've already proven your claim. But so we go forward.

Now, again, *Caluza* only was decided in 1995, and as a result, we don't -- this whole set of issues, even though it started germinating in 1990, doesn't get to the Federal Circuit until 1997 in the *Epps* case.

As I think one of my predecessors mentioned, the *Epps* case is interesting. Not only did the Federal Circuit affirm the CAVC's reading of the Statute, but not just the ordering provision, as what you had to establish well groundedness before you had a right to assistance, but also the *Caluza* three-pronged standard which, again, made that fertile, like well groundedness fertile, much higher than it had been.

So that's where we were in 1997. The Supreme Court, after -- originally, I should say, the Department of Justice did not respond or assert petition. The Supreme Court ordered the OJ to respond to the petition.

The OJ's opposition to the petition filed on some jurisdictional infirmities in *Epps*' individual case. Not the legal issue, per se, but *Epps*' case, specifically. And the Supreme Court hates deciding cases in which there may be a jurisdictional infirmity (Inaudible.)

Veterans' advocates, for the last several years, have been, at every turn, asking the Federal Circuit to reconsider *Epps,* and at almost every turn, or at every turn -- it's almost like a *Miranda* warning in Federal Circuit, which says something along the lines of a panel of the Federal Circuit cannot overrule *Epps* without a rehearing.

Eventually, we were hopeful that the Federal Circuit would get tired of that Miranda warning and would actually reconsider *Epps,* and we're hopeful, obviously, that they'll overturn that, and that's what has happened in Brock.

I will talk briefly about the recent cases, only briefly because they've already been alluded to, but I think what has happened is, again, the Federal Circuit has looked at this Statute, is having some second thoughts about whether *Epps* was rightly decided, whether or not this well groundedness standard makes sense, particularly if a standard is very rigorous.

And the Court, in really an extraordinarily short time, earlier this year, has issued four or five decisions in this area and they've all been referenced already.

The *Nolan* case has said that the CAVC cannot reconsider the well groundedness issue where either the regional office or the BVA has already determined that a claim is well grounded.

If the VA has determined to assist the claimant, the CAVC cannot reconsider that issue.

Hensley and *Winters* have been referenced, both cases in which the CAVC has found that there was a legal error by the BVA. The CAVC attempted to no vote determine the well groundedness issue, and the Federal Circuit said, "No. That has to go back to the BVA. That has some delays. The 745 days is horrible."

At least one advantage to remand in that instance is you can add to the record, if -- and a lot of times, claimants are, for the first time, represented by a lawyer in the CAVC, and are better able, on remand, then to add to their record.

The *Schroeder* case has also been alluded to. You may have had a well grounded claim for a

current disability as a result of an in-service occurrence. The VA is required to assist with respect to all possible in-service causes of that condition.

And then, last, with the *Brock* case, the August, the Federal Circuit ordered a briefing on the merits of *Epps*, if you will, of that legal issue.

So that, there you have it. You know, a call for judicial reworking of the claims process probably is in order, but it's probably worthwhile in remembering that this whole path we've taken in the well groundedness, duty to assist area started with, I'm sure, well-meaning attempts by the CAVC to make the process better in 1990.

(Applause.)

PROFESSOR O'REILLY: I'd like to offer an additional thought on *Hayre*.

I was requested by the Paralyzed Veterans to file an amicus on this case in the Federal Circuit, and I did.

I would point out to you a statistic. Under the Federal Sentencing Guidelines, the criminal sentence I would receive in Federal prison is about 745 days if I had done what the Veterans Administration did to Mr. *Hayre*, if I had written a letter with a false statement, "Mr. *Hayre*, we've reviewed your medical records, and you weren't treated for mental disorders while you were in the Marines," then I could be prosecuted.

In fact, they never got the records. In fact, they never looked at the records. In fact, they lied to Mr. *Hayre* in 1972.

The reason the case was in the Federal Circuit at all was that Mr. *Hayre* later found out that, in fact, they had lied. And when they looked in the service medical records, oh, yes, he had been treated, and he was deserving.

That was probably the grossest breach of the duty to *assist* the veteran, by lying to him. But if this was a private statement in which the individual had said that to the government, then the Justice Department, under 18 U.S.C. 1001, could have put that person in Federal prison for about two years.

Now, in that particular circumstance of *Hayre*, maybe it was an administrative foul up. Maybe they thought that they had the records and they thought they had looked at them.

But then why refuse to reopen the claim? Why refuse to give the person back benefits when you admitted later that it, in fact, had been your false statement that your agency made?

My diagnosis of "grave procedural error" is that the VA system is replete with grave procedural errors at the lower level and the acceptance of grave procedural errors at the levels above. And that's why I'm a "disestablishmentarian," for those of you who remember that word from grade school spelling.

I believe that the current establishment, the current system, ought to be replaced by a system similar to that of the Social Security Administration in which the independent Administrative Law Judge and the U.S. District Court are involved, rather than the current captive system.

MR. LUTHI: Are there any questions?

MR. MILLS: I'm Charles Mills. I'm the Department Judge Advocate of the American Legion for the Department of New York, and I have a question for Mr. Hipolit.

You've given us a pretty exhaustive view of the Federal Circuit's veteran jurisprudence, and one of the reasons you were able to do this is so little of it is published.

Are you familiar with an Eighth Circuit decision that came down about a month ago called Aushekholf against the United States?

PROFESSOR O'REILLY: August 27th.

MR. HIPOLIT: No. I don't believe I've seen that.

MR. MILLS: Okay. Well, this decision by Judge Arnold basically holds that any decision by a court, at least an Article 3 court, whether it's published, unpublished, declared to be precedential, declared to be unprecedential, has an equitable servitude stamped on it that you can't cite it, is forbidden by court rule to be cited, is still a precedent no matter what. It's a matter of Constitutional law.

If the Federal Circuit were to agree with this case at first impression, that would certainly give us a much huger body of law to deal with. And I wonder what your feeling is on this.

MR. HIPOLIT: I think, with a couple of exceptions, the cases I referred to in my presentation were all reported decisions. I think there was one, the *Giles* case, I referred to as being unpublished.

I think especially the decisions that have been favorable to the veterans have routinely been published. There's been a few that turn on the facts of the case that didn't get published.

But I don't perceive there being a problem that the Federal Circuit isn't publishing enough of its decisions. I find particularly that more recent pro-veteran decisions have all been published, and I think they're out there for people to see.

I'm not sure that procedure is a problem there.

MR. HUGHES: I would like to comment on that, too, just briefly, if I could.

And just as a practical matter -- I haven't seen the case or haven't read the case. I've heard on it, so I don't want to speak to the merits of its Constitutional opinion.

But just as a practical matter, I see that as a very bad idea as making every single written opinion

precedential, whether designated so or not.

As Dick said, most of the ones that are pro-claimant or reverse in favor of the veteran are published and are precedential.

It's generally the ones where the veterans' court has affirmed that are designated as non-precedential, and I think it's very important that the Federal Circuit be continued to be allowed to do that.

Because if they're not continued to be allowed to do that, I think you'll see a series of cases where they simply affirm under their Rule 36, without opinion, which I think is frustrating for everybody involved. It's frustrating for the veteran who doesn't have a written series of reasons for why his appeal is denied.

It was frustrating for the lawyer that may have represented the veteran who doesn't have the written reasons. But I really do see that if the Federal Circuit were to adopt a rule that made every written opinion precedential, that you'd see a huge increase in the number of affirmances of the veterans' court without opinion and then you'd be without the benefit of a written opinion to explain the reasons for that affirmance.

MS. DORENBERG: I'm Erica Dorenberg, General Counsel. I have a question for Professor O'Reilly.

You talked about increasing due process and also decreasing time lines.

How do you feel that those two things seem to contradict each other, especially in the VA benefits where we are so pro-claimant and we do provide for additional time to let the veteran get his evidence in or provide testimony and so forth?

PROFESSOR O'REILLY: The idea would be to move toward what the three Labor Department disability systems currently have in terms of the time of their cycling.

I think you could do that most efficiently by adapting the current Social Security Administration mechanism for appeals to the circumstances of the veteran; that is, keeping the presumption and keeping those other items.

The mechanics of putting together the five will, of course, be negotiated. I think it's significant, and I've learned for the first time today that the CAVC is going to have a number of judicial term expirations.

So if we were to sunset the CAVC and the Board, then sunsetting at 2004 would probably allow sufficient time for the training of the people in the Administrative Law Judge corps to do it.

Now, 745 days, as I understand it from your website -- it's not my website, of course -- is the period from the time the appeal is made to the time the appeal is disposed of, and probably the time limits could enhance the quality of the VA regional office paperwork process, which apparently

(from what my students have said from reading all these cases) the regional office paperwork flow seems to be a significant problem.

Possibly by us doing Special Masters, I suggest you could get the regional offices to hold to particular timelines or to hold to particular compliance standards for quality assurance. Maybe that would do it.

But I agree with you. It's not something that could be done overnight.

Now, you do have to balance a concern about the efficiency of the government system. I'm concerned that the time delays, particularly the remands by the Court of Appeals for Veterans Claims, are a significant inhibition on the sense of the perception of the veteran that they're getting due process.

And I'd like that addressed by the Court of Appeals for Veterans Claims by granting some claims and saying that where the Veterans Administration failed to do its work, we are going to grant benefits. We are going to act to shut down this 'hamster wheel" that veterans call it, by granting benefits as a remedy for delays.

I'd like that to be done more vigorously by the judges of the CAVC.

MR. LUTHI: Folks, in order to finish up here so we can have time to give everybody a break to have dinner or be in lunch by 12 noon, we'll take one more question.

MR. O'CONNOR: On that question, do you advocate that you applied EPA standards and Social Security.

It seems to me that every single decision has been pro-claimant recently, has been treating it as uniquely pro-claimant and as the veteran system of (Inaudible) that if you were to apply the EPA and apply the standard exhaustion requirements, the standard rules of practice would actually disadvantage the veterans.

I followed the *Sims v. Alpha* case closely because I've handled a similar case for the court. And the impression I got towards the procedural protection they give to Social Security are much, much less than the veterans.

There's no (Inaudible) requirement. There's a lot not written (Inaudible.) The attention that he gets from being poor, or whatever Social Security appeal is to keep this on average.

The appeal form is estimated to take 15 minutes, and only allows three lines which sets forth the argument (Inaudible) that apply to the EPA model, particularly the exhaustion of administrative remedies, which is the standard rules, that is very much a disadvantage to veterans.

And the general trend of the Court has been to treat veterans' cases like they're not really appeals. Like this is the veterans' court. It's not only the appellate court and the usual rules apply pro-claimant.

(Inaudible) money to treat one EPA model than money to advance the concerns of veterans.

PROFESSOR O'REILLY: If I left you with the impression that the Social Security system is perfect, I misspoke.

The Social Security system has deficiencies, but if you compare the Office of the Inspector General's reviews and the General Accounting Office reviews of what Social Security problems are, with the similar reports of what the VA system is doing by reading the VA Office of the Inspector General and the GAO reports, you find the GAO's view of the system is that the VA system consistently fails to deliver administrative fairness.

Reading the GAO, and reading the OIG reports, there are problems in the way the VA regional offices are operated, that have not adequately and systemically been fixed.

If they're not fixed in this current system, the veteran is just going to stay on that remand, and remand, and remand cycle.

I believe that a structural reform with the five systems of disability appeals is ultimately the optimal approach.

But we need to work out both the VA special circumstances, and the Social Security system's mechanics, in order to deliver what I believe is the right procedural due process.

MR. LUTHI: Thank you very much, panel.

(Applause.)

APPROXIMATELY 16% OF BVA DENIALS ARE APPEALED TO THE CAVC: ARE MERITORIOUS APPEALS FALLING THROUGH THE CRACKS?

Moderated by Ms. Rosalind Mailander

MS. MAILANDER: Good morning. I am Rosalind Mailander of the Court of Appeals for Veterans Claims. Welcome to the breakout session on "Approximately 16 Percent of BVA Denials are Appealed to the CAVA: Are Meritorious Appeals Falling Through the Cracks?"

We have a very distinguished panel before us and I'm going to introduce them. First, immediately to my left is the chief of the panel, David T. Landers. He graduated from the University of Connecticut School of Law. He served on active duty in the U.S. Army Judge Advocate General's Corps. Following his release from active duty, he served in the Army and then Navy Reserve until his retirement as the rank of Captain, 0-6, in 1998.

In 1966, he started working at the Board of Veterans' Appeals. He served as a Board member and later went on to serve as a BVA Deputy Vice Chairman. He then served in the Group VII Office of General Counsel and spent a few years, from 1991 to 1997, with the VA General Counsel. Since

then, he has been self-employed and working as a military law specialist primarily for DAV. Let's give him a warm welcome. (Applause.)

We also have with us Ron Abrams, who is currently the Deputy Director and Director of Training for the National Veterans Legal Services Program, NVLSP. Ron began his career in the VA regional office in Philadelphia. He later became a legal consultant to C&P, the Compensation and Pension Service. And he helped to draft the VA Adjudication Procedures Manual, M21-1. Since joining NVLSP, he has conducted more than 200 training sessions of various types.

He also serves as the Director of the Outreach and Education Component of the Veterans Consortium Pro Bono Program and helped to design the training curriculum for the Pro Bono Program. He is one of the authors of The Veterans Benefits Manual. Let's give him a warm welcome. (Applause.)

Keith Snyder has been in private practice representing veterans and their families since 1989. He is a founding member and past- president of the National Organization of Veterans Advocates. He was previously a staff attorney at NVLSP and the Vietnam Veterans of America. He currently edits a newsletter for Vietnam Veterans of America service representatives and provides training for veterans advocates. Let's give him a warm welcome. (Applause.)

Brian Robertson graduated from the U.S. Naval Academy. He went to the University of Maryland School of Law. He was a career Navy officer and spent more than eighteen years as a Navy Judge Advocate. He is currently the director of the Case Evaluation and Placement Component of the Program Consortium. And he is an attorney with the Paralyzed Veterans of America. Let's give him a warm welcome. (Applause.)

I will now turn the microphone over to Dave Landers, who is the chair of the panel.

MR. LANDERS: Thank you, Roz. First of all, I decided that because of time constraints, made clear to me by my fellow members of the panel, I shouldn't talk longer than my allotted time.

And after watching what has happened to one candidate for the Presidency on the campaign trail, who shall remain anonymous but who frequently gets tongue-tied, I decided that at my advanced age I'd better write out some remarks rather than wing it extemporaneously.

I also understand there will be a transcript of these proceedings published in the future in the Vet.App. Reporter. So, since I don't have a teleprompter here, I unfortunately have no choice but to more or less read from text which I will proceed to do now by welcoming you to this seminar.

The title is rather unwieldy: "Approximately 16 percent of BVA Denials are Appealed to the Court: Are Meritorious Appeals Falling Through the Cracks?" I didn't prepare that title. I'm not responsible for it, but there it is.

If you turn to Tab 4E in your looseleaf notebook, you will find material associated with this particular seminar. My opening remarks are intended to set the stage for the panel member presentations.

I will be followed by three distinguished speakers, all well-versed in the wild, wonderful, and wooly world of veterans law. Unless any of the panelists gets carried away with his presentation, there should be ample time for audience participation at the conclusion of the remarks. Therefore, we are requesting that you refrain from any questions or comments until that time.

It is not my intention to repeat, either verbally or by visual projection, the material contained in the conference notebook. And I am certainly not going to start off these proceedings by subjecting you all to a lengthy harangue about the myriad shortcomings of the veterans benefits adjudication system under which we operate. Instead, I would prefer to highlight certain points made in my written presentation as well.

It is perfectly obvious that the question posed as the subject of this session is rhetorical. One does not need to be a rocket scientist to determine that, in many instances, erroneous Board of Veterans' Appeals decisions are not being appealed to the Court.

Furthermore, of those appealed, a large number which might be substantively meritorious, are dismissed on such procedural grounds as an untimely notice of appeal.

In fact, according to my calculations - - which are always subject to review and correction -- in FY '99, approximately 22 percent of the Court's terminations (and I excluded writ terminations because those are not really appeals from Board decisions) were non-merits dispositions. Apparently, that's down from prior years.

At this point, I might add as an aside that in the many years that I was a signatory member of the Board of Veterans' Appeals, I would sometimes call in an attorney who wrote a draft decision and inform him or her that the decision was most impressive until I made one terrible mistake. The attorney would look at me at shock and horror and say, "What was that?" I'd say, I opened the C-file!

I wonder whether this ever happens to a Court of Appeals for Veterans Claims judge when he compares a draft decision prepared by his clerk to the record on appeal.

The moral of the story is that the BVA decision released to the claimant, who has 120 days to decide whether to appeal to the Court, may just be the proverbial tip of the iceberg.

We cannot always assume, for example, that the evidence reported in that decision is accurate and complete. And I certainly know this from personal experience, having reviewed decisions at the Board, having conducted quality review of the Board, and having screened decisions for one of the national service organizations. However, while the product produced by the Board may be fatally defective, it is not always apparent to the reader of that decision.

We all know that statistics are often quite misleading, whether it is unintentional or intentional. In my opinion, for any statistics to be meaningful the reader should know, number one, the source of the information, number two, the methodology applied.

I have attempted to do this in the written material with regard to the stats that are shown there.

By way of illustration, I not only explain the derivation of the 16 percent number, which is the subject of the topic of this seminar, but expound upon the reasons why, in my opinion, this number grossly overestimates the percentage of BVA denials actually appealed to the Court. One has to understand how the Board counts grants, remands, or denials to arrive at that conclusion.

Nor does the shockingly high, quote "merits error rate," unquote, shown over a five-year fiscal year period in the printed material appear in a vacuum. Both the sources of these data and the protocols employed are defined.

On the other hand, I recently heard a high official of the Board report what I believe he termed an accuracy rate of between 80 and 90 percent of the Board's decisions. I can only speculate that the number of Board decisions successfully appealed to the Court and/or the Board's internal quality review procedures may be in play. However, I do not really know how this particular accuracy rate is defined.

In any event, there appears to be quite a disconnect between the Court error rate and the BVA accuracy rate. Of course, this goes to the heart of the question regarding meritorious appeals falling through the cracks.

In any event, the fact is that during the latest complete fiscal year, two-thirds of appealed BVA decisions which were disposed of on the merits by the Court were bounced back to the Board by the Court on at least one issue. I find this number quite telling. As a matter of fact, over the five years tabulated in the handout, this is the highest error rate during that period of time.

I was, at this point, going to introduce the panel, but I realize this isn't necessary since that has already been taken care of. But I did want to add one item to one of my colleague's bio.

Mr. Snyder submitted an unusually short bio for any attorney. Mr. Snyder I'm sure will correct me if I'm wrong, but to the best of my knowledge, he is the first and only attorney to be the beneficiary of a monetary sanction imposed by the Court against the Secretary of Veterans Affairs. I invite your attention to *Jones v. Derwinski*, 1 Vet.App. 596, 608 (1991).

I remember it vividly because I was in Group VII at that time. Unfortunately, I was not in charge of Group VII at that time.

I will now turn over the discussion to the first panelist Brian Robertson.

MR. ROBERTSON: Good morning. I'm not going to use the microphone. I suspect most of you can hear me because it's not that large a room.

First off, I want to make an observation. If you look at the other folks who are on the panel with me, you will see that they all have a tag that says "speaker." Mine says "guest." So they are obviously trying to tell me something here. They want me to speak as little as possible.

One thing I did want to share with you. I don't know if you have heard this before. I stole this from my colleague Dave Myers in the back. It is sort of a description or definition of appellate

review.

It's sort of like baseball. It's the bottom of the ninth. There are two outs. You have a runner on base and there is going to be a play at the plate. The umpire is there and is ready to make the call.

If the runner is from the VA, the runner is safe and the game is over. The flip side of that is, if the runner happens to be a veteran and the play is at the plate and the umpire is there ready to make a call, well, that veteran is safe, too, but he has to go back to third. (Laughter.) It's sort of what we used to call a "do-over" when we were kids.

Sixteen percent of the folks who get adverse decisions from the Board actually appeal to the Court. So the question is, what happened to the rest of them?

One easy suggestion is that the other 84 percent were completely satisfied with that. In which case, I guess I could attempt to do a Forest Gump impression and say they were satisfied and that's all I have to say about that, in which case I could turn it over to Keith. But I don't think that is really the answer.

So the question then is, what happened to those remaining folks? The first thing is, when I was asked to participate in this panel I sort of felt like the individual in this particular Dilbert cartoon that I have modified a little bit:

Boss: "I have been asked to give a presentation at the Court's Judicial Conference. I'd like you to put that together for me, Alice." Alice: "What is your topic?" Boss: "The Court. They didn't say if I'm for it or against it." Alice says, "I'll leave some wiggle room." So I'm doing the wiggling up here with the statistics.

First thing is that the 16 percent figure that has been quoted seems to be pretty accurate. If you look back over the last five or so years, these were the cases where there were denials, and here are the Court filings, and you see that it works out to about 16 percent.

I came upon another interesting statistic when I was going back reading through the reports of the prior judicial conferences. Bob Comeau, the Clerk of the Court, made a comment at the Second Judicial Conference, which was back in October of 1993, that "generally, Federal Courts of Appeal receive about 9 percent of the civil cases below."

So if that's really an accurate number, and I don't have any reason to question it, maybe 16 percent isn't that bad after all.

By further comparison, we did some digging, and some folks in my office were very, very helpful in going through this, trying to see how the Court's statistics compared with statistics from the Social Security Administration dealing with Appeals Council denials and District Court filings. You see that over about a five-year period you are looking at about 19 or 20 percent.

So, again, you've got the 9 percent figure on one hand and roughly the 20 percent figure on the other and the Court and Board decisions somewhere in the middle.

By the way, a footnote to Chairman Clark, since he was kind enough to join us here: Your statistics and your report are wonderful. They are very easy to read. We spent weeks wandering around trying to obtain social security statistics and then trying to understand them. So yours were very, very helpful.

These statistics, the 9, 16, 19, and 20 percent, I'm not sure that they prove anything. But, again, it's just to show you a little bit of the spectrum there.

The second part of the topic deals with the phrase "meritorious appeals." I think you need to stop and think about that for just a second because exactly what are we talking about.

Are we talking about a situation where, if you are looking at a case, is one in which the Court issues a precedential decision? Or is it a broader definition? Is it one in which the Court grants some sort of relief to the veterans, whether that is a remand or a reversal. Whether it is some sort of a settlement or something like that.

I think since most of the folks who are involved with working with or on behalf of veterans, they probably would adopt the more generous definition of what is a meritorious appeal.

I did go on and take a further look at the Court's own statistics, which I will put up in just a second, with the caveat that, just because of the nature of judicial review, it's difficult to compare those numbers or statistics because you have cases filed in one year and you're trying to come up with some comparison with the results of the case. But generally, that's going to take place in a different year just because, again, of the nature of the process that it does take some time for the cases to actually move through to completion.

Our chairman talked a little bit about the appeal rate. All I've done is just to sort of redigest this for you. But I think the one thing that you want to try to pull out of this, what I found significant, is that even though the number of appeals went up significantly, the Court's action with respect to those stayed generally in the same range.

I think maybe the inference in that is that if there were more appeals filed with the Court, the rate there would remain the same and that therefore there are other meritorious appeals that are out there; they simply haven't been filed.

Meanwhile, of course, when you are looking at this you're trying to figure out why don't more veterans appeal. That's the question I think we have all wrestled with and tried to get our hands around on this particular panel.

I went a step further. I went out and conducted a very short survey of veterans service officers. I also conducted some interviews, when I was attending the Paralyzed Veterans of America Service Officer Training Seminar several weeks ago out in Reno.

I talked to a number of those service officers and put the question to them because I figured they worked with the veterans at the regional office level or at the hospital level and they are the ones who most likely might know why there aren't more folks out there who are taking advantage of the

opportunity of judicial review.

I will be candid with you. I didn't get a whole lot of responses. A couple dozen from the surveys I sent out. But please don't read anything more in these statistics or this information than it's worth because, again, that is a pretty small sample size.

I put two questions to the service officers. I said, why don't more veterans appeal and what should be done to address this issue or this fact?

As to the first question, why don't more veterans appeal, this is what they told me in sort of decreasing order of the number of responses.

Number one, they are tired of the struggle. They are just worn out because it has taken them so long to get through the administrative process. Unfortunately, in that kind of situation the VA wins by default.

The other thing that they said was that veterans generally don't know how to file an appeal. And the other thing is, the veterans think that it will cost them a lot of money to actually pursue judicial review of some kind.

In response to my second question which was, what can we do to try to address this problem, I think the answers are pretty obvious.

Veterans should receive more information about filing an appeal. They should be actively encouraged to exercise their right to file an appeal. And in some instances, be provided the necessary forms to file an appeal.

We know these forms are out there on the internet and other places. But, again, apparently a lot of this information is not filtering down to the regional office level.

I got some particularly poignant comments from some of the service officers who did respond to me. One, they said it is a process that they, the veterans, do not understand. Two, they suffer total frustration. That's their word; not mine. They suffer total frustration with the VA. And veterans are told that only exceptional cases are heard at the Court.

Obviously, there is some misinformation going on out there. It seems to me that if the veterans understood the appellate process better, then we might see more appeals being filed at the Court, and we might find out whether they are in fact more meritorious appeals out there.

Some observations of my own in the work I have done in the last five or six years at the Pro Bono Program and the Consortium.

First of all, I think it is true that there are few veterans who adequately understand the transition from the administrative process to judicial review. Of course, it couldn't be simpler. Write your name and address and the name of your Board of Veterans' Appeals decision on the back of the envelope, send it in to the Court, and you're done.

Then, of course, you have to pay a filing fee. You would think this would be simple, and the Court's process is in fact quite simple.

But in calendar year 1999, of roughly 2,300 docketed cases, 36 appellants had their appeals dismissed for failure to pay the filing fee or failure to seek a waiver of the filing fee. I know that because I counted them; all 36 of them.

I think that shows an awful lot about how information, pretty basic elementary information, about what it takes to get your case into Court and keep it there at the initial stage, is simply lacking.

We have all dealt with the Court's process dealing with designation of the record and counterdesignations and things like that. Again, that's a process that I submit to you few veterans understand.

Keith has a suggestion that he is going to bring up. Perhaps there is some merit in what can be done there.

Some of the things I think the individual groups involved in the process can focus on I think can be to go back and take a look at the forms that they use. They may pass legal muster, but the question is whether or not they are as efficient and as understandable as they could be.

Can a service organization do more? I've got to be careful because I don't want to bite the hand that feeds me. These guys can get fired by one boss. I have four that I work for. So I have to be careful.

Again, the service organizations provide a lot of information and provide different resources depending upon the organization.

I suggest that maybe they could all go back and take a look at the information they are providing and see if it couldn't be done just a little bit better and a little bit clearer.

The same I think can be said for attorneys. I think we have a responsibility, since this is our Court that deals with the veterans we are trying to serve, to go out there and try to get the word out.

What have *you* done? And I can ask the same question to myself. What have you done in your hometown to try to get the word out about the Court and the judicial review and the judicial review?

Let me conclude here because I'm being told that I'm running out of time. I do think there is a good bit of confusion out there. I have a slide or two that I hope will illustrate that and maybe even do something to ease the confusion.

I saw this at a storefront down in Virginia where my son is going to school at Virginia Tech. If I were driving up, I'm not sure. Party Central, or the Crisis Pregnancy Center up top? (Laughter.)

And the other one I saw, this is while I was out in Seattle. Somebody going up to the Future Shop only to find out that they are going out of business. (Laughter.) Thank you very much.

(Applause.)

MR. SNYDER: I'm going to try to describe what I think is some of the basis for why there are so few appeals that get to the Board. I start with the last piece of information that veterans are provided by the Board officially before their 120 days to appeal to the Court begin to run.

What are they getting? What are they told? First, of course, many of you have written decisions that go on for, not ten pages, not fifteen. Someone approached me yesterday and said they had a 96-page decision.

Of course, you are lawyers. You cite the cases. So you can't just read a sentence and have a period at the end and then go on to the next sentence. You have to have citations to court cases.

If you are a lawyer you can read these decisional documents. Lawyers kind of gloss over quickly the citations and just read the statements, read the facts, read the analyses. You learn as a lawyer to skip over all that stuff that is confusing. The italicized, bolded information. The cites to the statute and cites to the case law.

But our clientele, the veterans who we are serving, don't have that experience of reading this kind of nonsense, if they read at all. In the first place, are they college graduates? Are they high school graduates? Or are they largely World War II veterans who served for several years? They have worked many years. They are literate. But they not by and large college graduates, and they certainly are not attorneys. They are not adept at reading what I think is quite cumbersome language in Board decisions.

I'm not suggesting that you should bury the citations and footnotes. But somehow there should be an easier way to read what you are saying to them.

Of course you want them to understand what you are saying because it may be that what you're saying is correct. And you want to write persuasively and have them believe that, yes, they got turned down because it should have been turned down.

But when you bury it in dozens of pages of citations, I think the frustration level goes up for veterans.

Unfortunately, I'm not sure if that means they will go for an appeal because the frustration level is so high they frequently think, well, this must be right. This looks like a very carefully drawn legal document. It's comparable to what I see in some legal contracts when I go into real estate proceedings, so they must be right, and they drop it.

But after you sign your document, somebody in your office slaps this on them. You have the benefit today of an enlarged version of this form. Even so, some of you are squinting at it.

Guess what size type this might be in the real version? This might be 10-point. Maybe it's only 9-point type. It is nice because it's only one page. We like to have things compact sometimes into one-page documents.

But you have to look closely to say that, gee, this is an appeals notice. There is no big, bold title at the top. Well, it is bolded. Same type, but it's in bold print.

This is a lousy notice, I think. And I think this notice is one of the reasons that we only get 16 percent, if that is an accurate figure, of people going forward on appeal.

Read the notice. What is the first thing you can do? Number one, motion for reconsideration. What is the least likely thing to help your case if you do this? Of these choices, motion for reconsideration, is that likely to work? Do many veterans do it?

It's the first thing that they see, so they write back to the Board. The Board is very liberal in its construing of statements from veterans when they write to the Board after a Board decision. They liberally construe statements like this as a motion for reconsideration.

Hopefully, it has been filed, that motion for reconsideration, within 120 days although you don't see that right here, do you? And you don't realize that when you are looking at that first choice, motion for reconsideration, oh, my God, I've really got to do that within 120 days of the Board's decision because if I don't I will have lost my opportunity to appeal potentially to the Court later.

That's buried down there. But here, choice one, motion for reconsideration. It must be the first and best thing to do. I think that's bad advice.

What's even worse, number two. How often do you get motions for CUE, a clear unmistakable error in the Board's decision? How often has the Board in 1999 or today, in the year 2000, corrected based on CUE, one of its own decisions? Does anyone know of one?

We know of CUE decisions raised below from regional offices. But is there one case? I don't know of any.

FROM THE AUDIENCE: I've seen one, Keith. One.

MR. SNYDER: Okay. One. Nonetheless, that's your number two option. You exhaust doing motion for reconsideration, so let's do number two. That must be the next best thing to do. Or three, do an appeal to the Court.

What does a veteran have to contend with if they get to number three? You do have the right to appeal. But, of course, you had to have your notice of disagreement after November 18, 1988.

What is a notice of disagreement? Is there a date of a notice of disagreement in the text of the Board's decision? Page 1? Page 2? Page three?

On Page 2 you might find this appeal arises from a decision of X, Y, Z. Notice of disagreement? There is no reference unless the issue is the timeliness of filing a notice of disagreement. There is no discussion. There is no recitation of a notice of disagreement date.

So what is the vet to think? Well, surely, I must have done that. I know what a notice of

disagreement is. I keep track of those things. I have a calendar on my refrigerator and I'm sure I reported that sometime after November 18, 1988. So they've met that.

One hundred twenty days. Look closely. The fourth line says you have to file within 120 days from the date of mailing of the notice of the Board's decision and the date is on the face of this decision.

So you leaf back to the front and there is a date stamp on there. 120 days? What's that? You get the calendar out and you count 120 days. If it falls on a weekend, does that mean that you have Saturday or until Monday to file? Hopefully, you won't have that problem.

You've got to count 120 days. You can't say 120 days is about four months. So if this is September 18 I will have until January 18. It's not going to work that way. But you figure it out and then you mail it off to the VA.

And oh, by the way, you be sure and mail it to the Court. In here is the address of the Court. If you read it carefully you can find the address of the Court here. And it would be nice if you could send a copy off to the General Counsel. If you do that, that's fine.

But look. Here's number four. It says you can reopen. So you have four choices and only one of them is to appeal to the Court.

In fairness, the biggest amount of text I think is here in number three. So if your eye scans the biggest text, then you will think that is the most important one although it is a tight race between reopening.

Actually, reopening is only the first three lines. So if you exclude that part, then the weight of the text here suggests, if you read it carefully, appeal to the Court. I think that's lousy for vets to have to contend with.

Down here you are dealing with representation. You read all of that. And finally, way down at the bottom if you can read between the lines, you can write to the Court, whose address is up here some place, and say to them, give me a state-by-state listing of persons admitted to practice.

And then you can write to the Court, if you read the whole notice. They will send you a state-by-state listing and then you can turn around and ask one of those people to help you understand your options. And maybe you have done all of that within 120 days. That's a pretty tight time frame.

The biggest failing with this form is the absence of a date specific that the veteran has to postmark the notice of appeal. Why can't the VA say your deadline to appeal to the Court is X date? Why can't the VA have calculated that taking into account the Court's holidays and the federal holidays and the weekends?

Why can't the VA say that here is your date certain that you have to have mailed your notice of appeal? I don't think that is so mechanically cumbersome to do. And I don't think it is so difficult

for persons on the Board of Veterans' Appeals to calculate. Certainly it is a lot easier for them to calculate than it would be, I think, for our clientele. I think there ought to be a date certain of when you have to appeal.

And oh, by the way, why can't we have this in larger print so that people can read it, even if it spills over to the back side, the second page. And at the bottom of the second page, wouldn't it be wonderful to have a little tear-off like you get from the Debt Management Center in Saint Paul?

When they want money they send you a little coupon, pre-addressed, to send out how much you are going to send us to correct the debt. Maybe even a little envelope postage-paid to send the money back in.

When the VA wants money from you, they give you a coupon and they give you an envelope to send it back. Why can't the Board do that? Or at a minimum, why can't we have a date certain on this form? I don't think that's asking too much.

Instead of having the Court's address buried in Line 5 or 6 here, why can't you have the Court's address printed as if it were a real address? A three-line address here. This is where it goes. I don't think that's asking too much, in my opinion.

I think this would help. I think cases would go forward on appeal that ought to go forward on appeal if this notice were more simply written and were more user friendly.

I get the impression that the VA has adopted an adversarial posture towards veterans at this point. They don't want appeals to go forward. What better way to discourage appeals going forward than with a notice like this? It's just a badly written, badly designed, and I think poorly functioning notice of appeal. I don't like that notice.

But I don't want to limit today's discussion to just BVA decisions. I think there is a little more that could be suggested by way of enhancements and improvements in the system and perhaps some additional criticisms with regards to dates.

Before the Board gets the opportunity to consider the veteran's appeal, the veteran has to file an appeal form. This is the cover letter that comes on a statement of the case. Show me the date on this cover letter.

There used to be at least a reference to a deadline. Show me a deadline or the word deadline on this letter. Anybody? Is there a deadline? Is there a specific date to file your appeal form?

What does it tell you to do? Go look at the instructions. Read it carefully on the VA Form 9. Read it carefully. They will tell you which page to look at. But they don't give you a date certain by which the appeal form has to be filed.

Look at the enclosure, VA Form 9, and read the instructions carefully to find the date. There is no date certain on here. There used to be. Maybe this is more complicated and this is why they changed it.

It used to be that this cover letter would say, you have sixty days from the date of this letter to file your appeal or the remainder of the one-year period following the initial denial by the regional office of your claim.

Now the initial denial date is not obvious. So you're not sure whether you've got a year or you've got sixty days. That's what this form letter used to say.

But this is the enhanced version. This is what is now being used. This is to one of my clients on August 22 of this year, a cover letter from the statement of the case.

If the person gets this, they also get the Form 9. We have all seen VA Form 9. This is a VA Form 9. It's not as bad as it looks. It's just one page and you don't have to read the whole thing.

Here is the Form 9. Read the instructions carefully. Not on Page 1 or on Page 2, but read the instructions beginning on Page 3. Consider getting help. Good idea. What is this form for? Do I have to fill out this form? And finally, Number 4, how long do I have to complete this form and file it?

It doesn't say what is your deadline to file the form. It just says how much time you have. Then here is the language that used to appear on the statement of the case cover letter: You have one year from the day your local VA office mailed you the notice of the decision you are appealing.

Well, that's okay except what if there are multiple issues that you haven't filed on different months or different weeks and you got back multiple statements of the case? Or maybe you added an issue during the course of the proceedings and there was a supplemental statement of the case that contained an issue that was not on the original statement of the case.

Then what is the initial denial date to calculate from which you have one year to file your appeal form? It doesn't say "or". There is an explanation here that the date below here that applies to you is the one that gives you the most time. The language in the cover page used to say this date or this date.

So now, if this doesn't work out, you are hoping, of course, that the veteran has maintained carefully copies of the correspondence from VA.

Or they have the statement of the case and they could go to Page 2 and 3 and look at the recitation and history of the claim. Then they would find that there was a date of notification by the VA. It doesn't tell them where to find that information, but that's how you can get that. You might have 60 days left only to file this form.

Now, here is a little information about the supplemental statement of the case problem. So you might have read all the way down through C and there is a reference to an opinion by the General Counsel there explaining to you how the GC has construed this one-year period.

You don't have to be a lawyer to read this set of instructions. They tell you, gee, there is a General Counsel decision that might apply to your situation. They don't tell you what that opinion is or

where to get a hold of it. But nonetheless, there's that reference.

You try to make sense of those three dates. When does the appeal form have to be filed? I don't think it's an easy question and I think it should be easier.

I think this initial statement of the case cover letter ought to specifically state what the date is. Is that really a big deal? Is it too mechanical and difficult for the regional office to calculate?

There is a date stamp here. Why not date stamp on here that the appeal must be filed by X date? That's it. So there are two rubber stamps; not one. I think that would make the system more user friendly and it would be a little bit less frustrating for our clientele. The VA ought to do that.

In the absence of that, I am left with the sense that there is a conscious policy to discourage appeals going forward. I think that in fact is happening and has happened and it is the policy.

The second reason I say that is that the organization of which I am a member, the National Organization of Veterans' Advocates, had requested the names and addresses of veterans who had been turned down by the Board. Aside from whether it is really from the Board statistics, the number of cases denied, there would have been maybe 15,000 names of persons denied.

We wanted, as an organization, to have the names and addresses of persons denied so that we could write the veteran and offer our services as attorneys and, oh by the way, here's how you appeal. We know you got the appeal notice from the Board, but here's how you really appeal. Here is a little coupon you can send to the Board and the Court and go forward on an appeal to the Court. And here is a way to find a referral to an attorney in your area who can help you do that or assess whether you need to do it.

The Board, actually the information management people, came back from the VA and said, well, thank you for making that request but no thank you. Our Privacy Act, systems of records notices -- these are the annual notices that are published pursuant to the Privacy Act in 1974 which describes the various record keeping systems of the VA -- is not designed to permit us to release names and addresses of veterans turned down by the Board.

Now, it is designed to let us share with service organizations, members of Congress, and others those persons who are awarded compensation and who are the comp and pen rolls. That's a separate computer system. however, it has a routine use permitting the release of names and addresses of persons who are receiving compensation.

But it's a different system involving Board of Veterans' Appeals names and addresses. So we decided you can't have those because there is no routine use that would permit release of those names and addresses.

If you read the Federal Register from time to time, you will find that periodically there are routine use statements added by the VA and the federal agencies.

And the VA could have a routine use statement saying, oh by the way, names and addresses of

veterans turned down by the Board of Veterans' Appeals may be released to service organizations or other qualifying organizations who would provide information relating to title 38 benefits.

A very modest request that we made to the organization. No thank you. We're not going to do that. And it's not like this was done simply by the clerks over at the information resources office.

They had meetings and they had, I think, adopted a specific policy that we're not going to encourage or enable more veterans to appeal than currently made to wade their way through the system.

So I think that is one of the other factors as to why more veterans don't appeal. It's pursuant to the conscious policy by the VA, first, in writing awful letters and notices not providing specific dates.

Then I think there is evidence of the refusal to provide names and addresses of vets to which we would have provided additional information. And, yes, I think it would have encouraged more of these people to appeal and what not. But so be it.

Finally, I had the honor of sitting next to one of the judges on Saturday who went on about how the system works well. In fact, we only see the tip of the iceberg and the people who come to the Court are really the extreme cases.

They are really the cases of people who had conflicts within the agency and go forward and they are the extreme factual patterns, but that the majority of cases are handled well. They are handled correctly. They are handled properly.

In 1998, the Under Secretary, Mr. Thompson, had announced that he was surprised by a national accuracy review project that showed the national accuracy rate of 64 percent.

In a mass justice system such as the VA, dealing with lots of people, is 64 percent correct decision making good enough for our veterans? I don't think so.

I don't have the numbers that say the regional offices made 1 billion decisions in a particular year. What percent of those were not accurate? And then extrapolate from that the numbers that filed their notice of disagreement and went forward and filed their appeal forms.

My sense is that there are 64 percent of cases being handled accurately and 36 percent are not. There are a lot of people out there that have been given this information that should appeal.

As described earlier, there is a great potential that once you get to the Court, once you assemble that part through this process, you're going to get some kind of relief.

I would hope that there would be some changes to modify some of these forms. Changes in policy that would make the system a little more user friendly and veteran friendly, and that's something we should strive for. Thank you.

(Applause.)

MR. ABRAMS: Good morning, everybody. It's my job to sum up and to go over possibly some of the fixes that I think we can talk about.

Our consensus on this panel is that more veterans and more people denied by the Board of Veterans' Appeals should appeal to the Veterans Court.

How many of you as attorneys have had an aunt or uncle who slipped and fell in Safeway or some place, hurt their hip or their back, and they told you about it and you said, Aunt Clara, don't you think you ought to see a lawyer and try to get some money back? The floor was slippery. You may be able to collect some money. And Aunt Clara said to you, I don't want any trouble. I don't want the hassle. I'm not going to do this.

I've been doing this now since 1974. I can tell you that in some cases you have to convince the veterans to file a claim for benefits in the first case. And you really have to argue with them to appeal to the Board of Veterans' Appeals.

And to get some people then to appeal to the Court is very difficult even when they have good claims. Why? The main reason is they are afraid of a no. They think their names will be posted on a board and people will think they are cheating. And they raise their hands and say I don't want the aggravation. I'm tried. I just don't want to deal with this.

This is a problem in many disability benefits systems. You've got sick and tired people who have been confused by agency letters.

Have you ever looked at a social security letter? I see some smiles. They're not entirely good either. They're very confusing.

As part of my job, I go out to regional offices and check the quality of the work in the RO. Everything in VA is an acronym.

You read a rating decision that goes on for nine pages which is entirely Court cites and regulation copies. And then they will have a half-paragraph, claim denied.

And there are, not as bad, but also lengthy BVA decisions that go on and on and on and cite everything. The veterans get tired after page 22 and don't want to read any more.

But you have to put this in context. Most veterans who apply for VA benefits are represented by a network of advocates, some of whom are very good. Not all. It's a typical system.

And when I talk to them and I say, Do you encourage people to appeal to the Court, they say yes, but the majority of claimants are sick and tired of what the VA tells them. They are frustrated, as Brian has said. And they have a desire to put this bad experience behind them.

People just don't like being told no. It's uncomfortable. And one of the fixes that we have to think about whether you are a NOVA attorney, a service officer, with the Pro Bono Consortium, is how do we encourage the deserving appellants to appeal to the Veterans Court. That's hard to do and it's

going to take some effort.

When I listened to Brian talk, he talked about the fact that only 16 percent of the people who were denied by the Board or didn't get a less than full award from the Board appealed. He gave you three things why they didn't appeal and I wanted to talk about the cost of money to hire a lawyer.

That's true. Many vets feel that I'm going to have to pay money up front to hire a lawyer. I can't do that.

One of the things we can do, is either to encourage the service organizations or convince the VA to say it's possible you can get a lawyer to work for you for free.

There is more information that can get to veterans who have been denied to encourage them to appeal. For the private practice attorneys here, one of the things that you can do is to go to places where veterans meet. American Legion Posts, DAV Posts, VFW Posts. You can leave your cards.

There are self-help guides out there from NVLSP and other groups that you can purchase and attach your cards to and veterans may contact you and say, hey, I see that you are interested in this. Please help me.

I talked to a friend in Pennsylvania. They decided to get into this and they advertised at a local ball game. Then they called me and said, "We have 200 telephone calls. What should we do?" I told them they've got a lot of screening to do because some of the cases are not ripe to go.

So we have identified uncertainty, poor communication with potential appellants, and the fear of getting no for an answer. None of these things are going to be corrected overnight.

One of the problems about giving up the names and addresses of people who lose at the Board is that there is a privacy issue and some of them don't want their names out there for the logical reason that they don't want to be embarrassed any further. I have dealt with that.

I helped a lady in Seattle get a whole bunch of benefits for a sexual assault case. The regional office had turned her down. We worked with her Congressman and the RO there and we were able to get her about eight years at 100 percent.

Up until then, she wanted to go on ABC and NBC. After she got her award, she said, "I never want to deal with this again. It was the most awful experience in my whole life. I don't want to do anything. I don't want to mention it and please don't you mention it." And that was it. These people are not eager for publicity. They are sort of hiding.

I have other things that I could talk about. But the previous speakers covered almost everything. So I think now would be a good time to stop and take any questions that you might have. So now it is Dave's turn.

MR. LANDERS: I'm exercising my prerogative as chairman just to make a couple of brief comments based on the material already heard and then I will turn it over to the audience for

questions.

First of all, since VA has been slapped around a little bit today I thought it deserved a little pat on the cheek. I saw some recent stats from the Board of Veterans' Appeals for FY '2000 through June. And quite frankly, it is the highest allowance or grant rate I have ever seen, 25.9 percent.

What this means, of course, and if you read the papers that were prepared in Tab 4E, you will know that doesn't necessarily mean a grant in toto. It means at least something, a partial benefit. or at least one issue, was granted by the Board.

The second item. I want to emphasize another point that I tried to make earlier. The 16 percent figure, in my opinion -- and the other panelists might disagree -- is very misleading. It grossly overestimates the percentage of appellants who go to the Court. This is because the Board employs a trump sequence in tabulating decisions.

If the decision is a mixed disposition and anything is allowed, that's an allowance. If anything is remanded and nothing is allowed, it's a remand. So it's only denials in toto that come into play here that are the origin of this 16 percent figure.

Just for the heck of it, I recently took a sample of 250 Board decisions that would have been counted by the Board as an allowance or a remand. Believe it or not, 40 percent of those have at least one issue that was denied, essentially appealable to the Court. Or a situation where perhaps there was an increased rating and the veteran got an increase, but not as much of an increase as either he thought he deserved or he was legally entitled to. So I did want to make that one clarification.

At this point, since we all on the panel have gotten our two cents in, is there anybody here in the audience who would like to either direct a question or comment to the panel in general? Bob Philipp from the Board?

MR. PHILIPP: At least three of you, or I think all of you, are involved in the screening process of the Board decisions for possible appellant review. I would like an individual definition of what is a meritorious appeal.

In other words, you screen and you must screen some of those appeals that are not meritorious or some of those decisions as not having involved anything you could call a meritorious issue for appeal. How do you define a meritorious appeal?

Mr. Snyder, I know you have declined to represent certain people even after the Board because you concluded at some point that their appeal was no longer meritorious.

MR. SNYDER: There are a couple of ways as an attorney in practice that you look at cases. Perhaps the initial unfair way is to filter in how much money there is to be made.

Fortunately, with the advent now of the Equal Access to Justice Act money, it may construe the way a case as meritorious. Previously, if you are looking financially at the benefits of taking an appeal forward in the absence of EAJA fees, you had the pretty sound sense that past due benefits

would be generated at some point. It wouldn't just be a 10 percent for two years increased rating. Maybe there was unemployability involved in it and the person had been getting only 30 percent, but maybe he could get 100 percent based on unemployability for five years. So there is much more money involved.

But as a practitioner I would look, quite frankly, at whether I could win benefits. And most often I don't have to deal with, well, what if the person is asking for health benefits or to have the ability to have access to a specific procedure through the VA health care system?

I don't see those cases. I'm not sure if that's because they don't come forward on appeal very often, but I don't have that. Of course, in such a case there wouldn't be past due benefits generated.

But with the advent of Equal Access to Justice Act fees, then there is another level of evaluating whether a case is meritorious. Is the Court going to do something with it, maybe just by technicality?

Did you fail to write a full explanation of your denial such that the VA attorney could be persuaded to enter into a joint motion for remand for failure to provide adequate reasons and bases for the denial? Equal Access to Justice Act money. It may only take ten, twelve, or twenty hours' worth of work to do that case. But if it is twenty times $130 an hour, that's whatever and that's money. So I've gotten paid.

One hundred thirty dollars an hour is, I think, a good sum of money to be remunerated for. It certainly doesn't compare to the 20 percent of past due benefits for cases that have been languishing for ten years. But that mixes into my assessment of what is meritorious about a decision.

And, of course, individually and personally when I have been approached by people who are being assessed overpayments and debt collection is being instituted, there are no past due benefits I'm going to get for that person. But those cases are always so personally galling and I usually take those.

And, of course, the fee for that would be Equal Access to Justice Act money. There are no past due benefits available in those cases. Sometimes money that has been recouped can be reimbursed, but I have never seen that happen.

I often look for the adequacy of your explanation. It's meritorious in my mind if you have failed to do your job in assessing the evidence and if it passes the laugh test. There is a laugh test that you apply to some cases. I don't take all cases.

I have the luxury of doing work at my home and I don't have face-to-face contact, quite frankly, with any prospective clients. So I have them on the telephone and sometimes you feel like saying, gee, you want me to do what with that?

It doesn't pass the laugh test in some cases. It's just not going to go any place. So that's kind of the evaluation that I go through.

MR. SAMANSKI: When you find a case that doesn't pass the so-called laugh test of yours and you appeal it, according to your own words, for the EAJA fees --

MR. SNYDER: No, no. That's not what I'm doing. If it doesn't pass the laugh test, that also ties in as to whether it is meritorious or an issue that is well-rounded, an issue on reasons and bases, for example.

If it doesn't pass the laugh test, and I don't think that after taking it forward to the Court that the person is going to get past due benefits, I will tell them, oh, by the way, I think we could make a technical argument to the Court and the Court might well remand us and I could get paid attorney's fees for what I've done for you. But I don't think, quite frankly, you're going to get anything ever for your claim.

I have the luxury in private practice to be able to say that to people. In my experience that means usually, well, let's stop it. Let's drop it.

I'm not sure if half the times I talk to veterans I'm really discouraging the appeals. But maybe.

MR. SAMANSKI: Let me just make one comment or observation. We see a number of appeals where all of a sudden the attorney disappears after they get some procedural reading. When there are no benefits paid, the attorney gets his EAJA fees and then disappears.

MR. SNYDER: There are some who take cases only for representation at the Court and who have no subsequent contract for the past due benefits. There is a portion of the private bar that does it in that fashion.

And, of course, the Pro Bono Consortium takes cases that they only obligate their attorneys to provide representation at the Court and there is no obligation to follow it back to the regional office. Many do. But nonetheless, that may be one explanation as to why a case is dropped.

I don't do that. I follow cases partly because God knows what you're going to say next. I might take a case that I didn't think had a whole lot to it, but then lo and behold there are past due benefits due. You look at the money involved subsequently if there are past due benefits. If my fee is $10,000 out of past due benefits and I've gotten maybe $2,000 EAJA fees and I offset that, I still end up with $8,000 that I wouldn't have had if I'd just stopped at the Court level.

I don't know why so many attorneys don't follow through back at the regional office. You would think they would. They need to. They should. But I agree. I see that, too.

MR. ABRAMS: In answer to your two questions, we screen thousands of cases. Basically, we look for cases that have a reasonable chance of winning at the Court and have a reasonable chance of winning benefits when all is said and done.

We also take a case that may not have a reasonable chance of eventually getting benefits if we are going to establish an important legal point and that point has been made by the Board and it's time to have that changed.

We do contact veterans and invite them to appeal in some cases and in some cases they actually turn us down. We don't look necessarily at the amount of money the vet is going to get. But basically, whether it is reasonable the vet is going to win at the Veterans Court and then at the regional office.

So we do follow up in the sense that we work with the service group that asks us to screen the case. We may be not officially representing the veteran, but we do act on it.

MR. PHILIPP: In your screening, do you go forward with more than 16 percent?

MR. ABRAMS: I would say we have about a 30 percent hit rate and it's simply that's all the resources we have. It may be more. We're finding a higher hit rate as a result of Federal Circuit decisions and other things that have recently come down.

We find generally that PTSD, mental condition evaluations, acoustic trauma claims, seem to be unfairly denied and many of these cases can be won. Other cases that we look at carefully are joint claims, where some of the Board members have trouble with the General Counsel decision on how to evaluate an unstable knee.

MR. LANDERS: I would like to add to what the other two gentlemen have said and, first of all, clarify my position. I have no interest in EAJA or attorney fees like some of the other panelists.

When I screen a case I not only look for merit, which of course is in the eye of the beholder, but what if anything will the claimant ultimately get out of this claim. Granted, as Ron Abrams said, maybe this particular claimant will not benefit from a favorable Court decision, but it could engender precedents that would help other claimants.

Having said that, we have to realize that many cases go back to cross the T's and dot the I's. For example, the Board decides not to reopen it. You look over that file and you say, well, the Board really should have reopened it. But what difference is it going to make to this veteran because ultimately it is not well grounded as we now understand well-groundedness. I think it can be very frustrating to claimants when you get a remand that goes back, there is a further delay, and they're going to get the same answer as they did in the beginning.

Also, another thing that I look at when I screen cases. Let's say, for example, a veteran already has a 100 percent permanent rating and he has no chance of 100 plus 60 percent rating at the housebound rate and he wants an additional 10 percent. Well, what is all the fuss about? Really ultimately the veteran will gain nothing monetarily from this.

So, in my opinion, it might be a case that by one definition has merit and by another definition has none. And as I have said, merit is often in the eye of the beholder. Brian, did you want to comment?

MR. ROBERTSON: When Ron was speaking earlier, he was making reference to NVLSP as opposed to the Consortium. From my standpoint, we look at about 500 cases a year roughly. Of that, we refer -- the number varies from year to year -- but it's probably about 35 percent of those cases out to attorneys, which suggests of the others, that we did not find a meritorious issue in that

and we did not refer them out to an attorney.

We're not perfect in our assessment of the cases that we refer out to attorneys. The attorneys prevail and the client prevails in about 75 percent of those cases. And of those cases that we did not accept into the program and did not refer out to an attorney, the Court finds something that we didn't arguably in probably about 11 or 12 percent of the cases.

I think the thing that you can draw from that is, since we only send out about 35 percent of the cases, that there are a number of decisions we are looking at where we think the Board got the right answer.

The other thing is that in trying to define a meritorious appeal, generally we look at it to see if we can find a non-frivolous issue because we don't want to waste the attorney's or the Court's time in dealing with a case that doesn't have such an issue in it.

MR. GULLY: My name is Solomon Gully. I am an attorney for the Board of Veterans' Appeals. The question I have is, I know that Mr. Snyder was discussing criteria in deciding whether or not to take a case. I've noticed in reviewing claims folders that occasionally when you see a denial the hearing officer will do a good job laying out the facts in the analysis of the case. And then you will often have the veteran at that time proceed on the issues that are more meritorious. They will understand the reasons for the denial and they will want to pursue those particular issues.

I'm wondering to what extent you think that the veterans decide not to appeal these Board decisions based on the fact that the Board gives them a fair and concise basis for the denial?

MR. ABRAMS: That's a good question. When the Board is clear and uses simple language it's a good way to prevent people from appealing claims that can't be won at the current time.

Sometimes Brian will get a case and he will look at it and he will say you can't win. But if you get this bit of evidence you might have a chance. If the VA could improve the way it communicates with veterans, it would help.

We had a case in Boise, Idaho where the regional office in the statement of the case told the veteran that because he had a job his claim for individual unemployability was denied.

His job was to go to a junk yard and take two pieces of metal and bang them together for eight hours. He had a GAF score, a global assessment of functioning only of 33.

He thought that the issue was he had a job. He wasn't getting paid to bang the two pieces of metal. It wasn't until the Board got the case, overturned it, and signed off on 100 percent, that the true issue was explained to that veteran.

We see that in some Board decisions, too, where the issue is misidentified, but to a lesser degree.

MR. LANDERS: I would also like to add to this matter of what is merit being in the eye of the beholder that reasonable attorneys can differ with one another.

I use as an example a case which I settled on the merits when I was in PSG VII. This was before Brian's time. So he is free and clear. The Consortium had passed on that case when contacted by the veteran and decided that it had no merit.

But the whole point is that reasonable people can differ. As soon as I saw it I said we could pay this veteran and we went ahead and did that. Are there any other questions from the audience?

MR. SNYDER: I think the advantage of what you saw in the hearing officer setting is something which the VA would be well advised to kind of expand.

I know recently there was a DRO, a Decision Review Officer program, where there are informal communications. Fewer formal hearings like hearing officers have, but more informal communications with veterans and advocates.

I have always felt that if people were told you have to have a hearing, you have to present yourself to this person and explain your case, that the decision maker would have a better sense of what this person is saying, what this person is asking for, and whether we can suggest some additional evidence to be had. And do it orally, do it there in person.

I think the VA system is stacked against that kind of personal contact. It would be a good move to encourage more hearings to the Veterans' Appeals level, let alone hearing officers, because once you come in and meet that hearing officer or decision officer or Board member, they are not the bureaucratic augurs that you may have thought.

They're people. They will shake your hand. They will talk to you. And they can explain what's going on in a case and help you understand what the issues are.

I was in Wichita on Tuesday of last week and the first fifteen minutes of our discussion with the hearing official was to make sure that we have these issues fully understood. And we went on to make sure it was very clear to my client and to me what it was exactly that this hearing was going to cover.

That additional personal contact perhaps would be much more advised within the VA system. Social security, for example, insists that after they have done their initial denials if you want to appeal, you appear before the Administrative Law Judge. Otherwise, you don't appeal.

Of course, when you appear before the ALJ, your evidence is laid out, it's tabulated, it's numbered. They have the number of pages for each of the exhibits. We all know we are on Page 1 of this case and you walk it through.

It really forces you to finally focus on what's going on in this case, where can I go in this case, and what is the evidence, and have the personal contact with the decision maker. I think that is a process the VA would be well advised to expand and encourage.

MR. GULLY: I think what I'm taking away from all of your presentations is that there is a lot of frustration perhaps in the procedural aspect in not understanding what's going on rather than say the

denials themselves. And if they truly understood the denials, then they would be better able to make a decision as to whether to appeal or not.

MR. ABRAMS: I'm sorry. I don't buy that and I want to make this clear. There are some people who are confused by the process. But in the cases we screen, we are looking at claims where the development was inadequate, where the reasons and bases were not adequate, where the Board member misinterpreted what a well-grounded claim was, where the facts were weighed out of balance, where we think the preponderance of the evidence is in favor and at least there is a balance. All of these things make up the majority of the cases that we take.

The cases that we don't see, I can't talk about. But we are looking at good cases on the merits where people will get benefits. And as was noted today, attorneys have picked up about half of the pro se cases. They must have some merit or the attorneys would not have taken them.

MR. LANDERS: Are there any more questions from the audience?

MS. MOORE-SIMMONS: I'm Cynthia Moore-Simmons. Mr. Snyder made some very practical suggestions. What happens to those suggestions after they come out and they go back to VA?

MR. SNYDER: There is actually sort of a direct pipeline to the VA at this session. So we'll see.

MS. MOORE-SIMMONS: Are any committees set up in order to see some results?

MR. LANDERS: Well, many of us, being currently employed by the VA, perhaps we are not the best people to pose that question to.

MS. MOORE-SIMMONS: Is there anybody who can answer that question?

MR. LANDERS: To hear how these things work, Chairman Clark would like to address that question.

CHAIRMAN CLARK: For the court reporter, I am Dane Clark, Chairman of the Board of Veterans' Appeal. I appreciate all of the information that you have given today. I came here for that purpose, to learn how the Board's procedures are perceived and I have learned a great deal.

I would like to invite all of you gentlemen to continue to write us with this kind of feedback. I have a great deal of respect for your experience, for your competency, and your professionalism. I would like to think that you will continue to provide us with feedback and keep in contact with us so that we can benefit from your suggestions.

I am particularly sensitive to the need that we have to communicate with the veterans. Not just tell them something, but to communicate the meaning of what those things are. And I am particularly appreciative of your direction of the lack of communication as a result of the appeal notice. I think that is a starting point where we can begin to communicate with veterans.

As to their perceptions of other matters affecting decisions and procedures, we are going to have

to handle them pretty much on an individual basis.

But I can assure you that we will take advantage of the information that is available to us and we are continually reevaluating procedures. We recognize that there are many areas of dissatisfaction in the Department and the Board. We are just basically bureaucratic-type institutions that are kind of statute-bound and regulation-bound to some extent, and tradition- bound. But we have a duty to our veterans to overcome those obstacles and make the service to continue to improve. Thank you.

MR. LANDERS: Thank you, Chairman Clark, for those delightful remarks. I see someone standing.

MR. TAYLOR: My name is Henry Taylor. I am a member of the American Legion and an employee of the American Legion.

Under the previous Chairman of the Board of Veterans' Appeals, and in conjunction with the service groups, a booklet was prepared and unfortunately the appeal actually gets to the Board of Veterans' appeal when he learns how he should have done it.

Why can't the VA publish, maybe even in connection with people like you in Group VII, a booklet that would accompany the decision going back to that veteran who would then know what the proper procedures are to appeal to the Court or make a motion for reconsideration or even to reopen his claim?

MR. ADDLESTONE: I'm David Addlestone. That's a good point. I had time to read that pamphlet about a month ago and it's really quite clear. I was trying to read it from the veterans' standpoint and it's about the clearest document I have seen from the VA.

There is some material floating around out there that is relative to what we have been talking about this morning. But by the time a veteran gets through the more complicated material, the Board of Veterans' Appeals won't see that veteran.

MR. LANDERS: A point well taken. I see we are getting close to the lunch break and we don't want to hold anybody over. Are there any more questions?

MR. BELLAMY: Mark Bellamy. I'm in private practice. I don't know if there is a solution to the problem. But I would like to go on record and say that I believe that approximately 20 percent of the veterans that I talk about appeals demonstrate signs of mental illness and I have a concern about that.

Their thought process is irrational. I don't know how we solve that problem. But I believe it is a problem. Thank you.

MR. LANDERS: Thank you. Maybe it is about time to wrap up this session. I hope we have managed to shed more light than generate heat on the subject.

We certainly don't expect any unanimity on either identifying the problem or posing solutions, but

I feel the discussion has been healthy. We have certainly had some provocative ideas expressed today.

I would like to personally thank the panel members, Brian Robertson, Ronald Abrams, and Keith Snyder. Would you all please give them a final round of applause. And thank you all.

QUALITY CONTROL OF VETERANS BENEFITS DECISIONS

Moderated by Ms. Jennifer Whittington

MS. WHITTINGTON: This is a break-out session on Quality Control within VA. It includes both RO and BVA decisions.

I'm Jennifer Whittington. I'm an attorney with the Support Central Legal Staff, and I will introduce our panel.

First, we have Mr. Robert Epley. He's the Director of VA's Compensation and Pension Service. An Army veteran, Mr. Epley joined VA as benefits counselor in 1974. He was a claims examiner and then a management analyst with the Office of Data Management and Technology. In 1986, he moved to the Nashville Regional Office as Assistant Director, but returned to the Centra Office as the Deputy Director of C&P Service in 1988. Mr. Epley has been Director of both Detroit's and St. Louis' Regional Offices.

Next to him is Ms. Ruth Whichard. She is the Chief of Systems Development Staff for the Compensation and Pension Service. She has been with VA since 1976, working in Nashville, Tennessee; Indianapolis, Indiana; and now the central office. Ms. Whichard has worked as a claims examiner, rating specialist, and quality review and training coordinator. She was the Assistant Veterans Service Center Manager in Indianapolis at the time she accepted her current position in September of 1998.

Mr. Richard Standefer is Vice Chairman of the Board of Veterans' Appeals. He served in the U.S. Army from 1967 to 1970 including a tour in Vietnam. He joined VA in 1970 as an attorney for the Board. In 1976, he was appointed to member of the Board, eventually becoming the Board's Senior Deputy Vice Chairman in 1995. He has served as Vice Chairman since December 1997, and he served as Acting Chairman of the Board from December of '97 to November of '98.

We'll start with Mr. Epley and Ms. Whichard discussing the RO quality control and risk management protocol and go on to the Board.

As Jamie mentioned in the opening session, there were several questions that were submitted that did not fit the plenary session for tomorrow that were forwarded to me. And if there are any questions from you guys, then I will ask some of those questions later on. With that, I'll turn it over to you.

MR. EPLEY: Thanks, Jennifer.

Good morning. You all had a wonderful start this morning, right? I don't know anything about what the judge said. I don't know anything about those case decisions he was talking about.

But we're here to talk to you a little bit about the structure of our process, trying to focus a little bit on quality improvement and quality assurance.

I know many of you in the room, and it had been my intent -- I thought I was going to be talking to a bunch of strangers, so I can go very basically.

I was going to talk a little bit about the structure of the Veterans Benefits Administration and how we go about our business. Now, if I were to take 10 minutes and do that, how many of you would be asleep within the 10 minutes, having known all that? A couple of honest people, okay.

How about if I take a minute and a half to go through that? I think that most of you are pretty familiar with the way we're set up. We will talk to you a little bit about our structure. We will give you a little description of skilled positions in the C&P Division, which we refer to as "The Service Center" and talk a little bit about the changes that we're going through.

Ruth will give you a couple of case studies on things that we're trying to do to improve our business and focus on better accuracy and better customer satisfaction. Then I'll talk more specifically about our Quality Assurance Program.

Operational structure. We have 57 regional offices. They have been broken under the Thompson Administration into nine Service Delivery Networks. This is a fundamental change in the way we do business, because prior to that when I was a director for St. Louis, I reported directly to an area director in headquarters. I had a little more time.

I worked with my fellow directors, but not to the degree and with the rigor that they do under service delivery structure. It is intended to give us better opportunities to share resources and to make sure that we even out the office delivery in the process. It's about two and a half years into play.

We have about 11,700 employees in Veterans Benefits Administration. Over 6200 works in C&P Division. So clearly, within the Benefits Administration, Compensation Pension occupies the greatest number of resources.

If I can put in a plug to those who have an opportunity, we need more. We always need more. So we have been fortunate over the last couple of years to be able to increase the number of people dedicated to the compensation area. But we have been in a deficit for some years and both, the recruitment and training of new employees is a big effort that we are working on.

Compensation and Pension is one of five basic business lines in BVA. In the regional office, it would be atypical to have all five representatives. Insurance is done at one regional office in Philadelphia. Education is done at four sites, St. Louis being one of those four. I was the director there. So the typical regional office, about two-thirds or more of the people there are related to doing C&P business.

And you have a vocational rehabilitation operation, which is usually the smallest division. And in the most places, there's a loan guarantee function. But that's been regionalized, most of that work to nine sites. But the individual property unit is quite familiar on site.

So once again, typical regional offices when we do our businesses, two-thirds or more is related to compensation pension. That is a growing function.

I think that for most of you involved in the process, we are the ones that draw the attention. We are the ones that draw the criticism, some of it deserved. Some of it is a little over exaggerated. But we can talk about that as we go through this. We are moving into a new way of doing business in the C&P business line.

When I was a claims examiner, and Ruth, we were pretty much production line oriented. Cases came to me. They had reached a certain stage. I did my part and then passed them on. We are changing that to a team-based environment. We are trying to invoke case management as our basic way of doing business. And that means that we have to offer new skills and new training to people that are out there. And they need to accept ownership of the process from the day the claim comes in collectively, instead of a minute part, which is the way we used to do it.

Our premise is if we accept collaborative ownership of the claim. And if we seek more direct and more frequent contact with the vets, we'll give better service. We are in the midst of that change. We have been given case management training to our regional offices.

Over the last nine months, we probably trained about 30 stations. We will have 40 to 44 trained by the end of this calendar year. And early next year, we should be fully trained and moved into the case management environment.

We think this is a fundamental change in the way we do our business. We do think that it will help us give better service, better service to the veterans by being more directly accessible to them, to the people who make their decisions. And we think it will help us improve our accuracy.

We're changing our phone system so that the veterans who are claiming, any representatives can get right to the decision makers. I think Jennifer said when I started out, I was a benefits counselor. As a benefits counselor, I was on the phone talking to vets who called with questions. As you might expect, I was a stellar VBC. But even as good as I was, I didn't have all the information at my fingertips and did a lot of guesswork trying to tell the veteran the status of their claim. I didn't have the claims file in front of me. And probably I never talked to the person before, and it was a struggle for me and it had been a struggle for the vets.

That's why we're getting out of that style of business. We're trying to get them into a team that operates their cases so they can talk to the person who handles it. And again, our goal there is to keep them much more informed on what's going on.

Coincident with that or as a necessity of making change to case management, we have to do a lot of work in retraining the people that are doing the C&P business. We do not have requirements, perhaps as we mentioned. I wasn't at that morning session, so if I say something contrary to what

you heard, excuse me. We do not require that our claims examiners that we call "veterans service representatives" be legally trained coming into the job.

Traditionally, over the last 20 years or so, our recruitment has been a combination of elevating people from the region organization who know our business at the clerical or at the lower technical level into veteran service rep jobs and balancing that by recruiting people from outside, primarily outstanding scholars from out of school and then providing them training.

Now, we are in a position where because of the changes we're making, we have less and less clerks. Less and less support staff to help the actual decision makers, and that's purposeful.

We want the decision makers to be involved in all of the steps of the job. We are not recruiting clerks and support staff as we have in the past. So we don't have as many of those people to promote through the rank. We are, as a result of that, hiring more people from the Outstanding Scholar Program. And we have training classes going on this year from July through September.

Every three weeks, we're bringing in 50 new recruits. And so far, I speak to those people when they come in. There are a vast majority of them coming in directly out of school. And we see that as a positive thing. We need the education. And we need to bring them into the program where we can show them how to do our business, VA's business.

Those programs are called "opportunities." Those basically are students' orientation to how we do business in the VA and Veterans Benefits Administration. And the people that we're bringing in are almost exclusively the basic technical field opportunity veterans service representatives.

Under the transformation that we are undergoing to move toward case management, we're moving from a process where we had about a dozen positions involving the claims process, more than half of them were clerical, to a situation where we really got three basic technical positions involved in the process. The veterans service representatives, who is the person who will usually write the order denials in the evidence gathering.

The second position is the rating veterans service representatives. Those are the people who have been taught through the veterans service representative training to know the basic adjudication and claims and then are given separate training for what amount to user disability schedule to do the rating evaluations that are the core of our process in compensation. And those are the people, the higher graded technical people in our operation. We got about 1300 of those out of 6,000 plus.

And the third position is a brand new one. I understand there might be some questions about the decision review officers. It is a position that we have designed to try and help us improve the field process. We work with different staff to try to make sure that we design the employee functions and hearings a little more informal at the earlier stages to give veterans a better chance to have their decisions explained to them and maybe get a second look at their claim before they have to go into the formal thought process.

The DROs, decision review officers, there are few level jobs. When we designed that program a couple of years ago, it was intended that they would be doing all the appellate work. Unfortunately,

we have a lot of field work left.

As we tested it, we decided that DROs needed to have support staff with them. And we are expecting that they will be ultimately embedded into the case management team and that the VSRs ratings VSRs will help them do the necessary work to prepare cases. And if they go through the formal appellate process, they'll still get the statements of the case and form a legal document that we need to fulfill our responsibilities.

But it's a position that offers a new authority for us in the field to be tested for a couple of years. And that is that the DROs have the authority to change an original decision on differences of opinion or on clear and unmistakable error. We pleaded for that.

We have results from the test that we ran for a year, to show that it works. So we feel pretty confident that that position is going to succeed. And we had a fair amount of feedback from the stakeholders in the process, especially the National Service Organizations which were strongly in favor of the use of DROs.

Training. Traditionally, training in the Veterans Benefit Administration has been done locally. And it's been done one-on-one. I was trained by a senior adjudicator when I was a GS-7 and then by a rating specialist of a senior skill level. And I think that I was fortunate because my trainer was both a knowledgeable person and a good communicator.

But the risk that we had traditionally is that you were subjected to the skills and abilities of your individual trainer, so that if you had a person with good faith and who was highly skilled technically but couldn't communicate very well, you might not get the information as clearly as you need to. We saw from that that there was unevenness in the way information was being communicated around our system. We tried to fix that.

We are building a much more systematic training program for our skilled positions. We are building it centrally, so that the content of the training, we feel, will be more consistent and will lead to more consistent results.

I mentioned the orientation class. When we bring in new VSRs, veterans service representatives, we'll bring them in to the Baltimore training academy two weeks. They will hear orientation discussions from all of the leadership teams within BVA.

I spend, either I or my deputy or one of my assistant directors, about four hours with them explaining to them the C&P overview and let them know what their current priority in the program are. The other business lines do the same. They get general orientation on the history of the VA and our mission so that they have a pretty good understanding of what they're into.

We are building a computer-assisted training program that we call "Training and Performance Support System," TPSS. It is intended to be a modular training package that can be administered locally, computer-assisted, with less direct intervention from the one-on-one trainer. And it can be done in groups of two or three, so that they have a little collaborative learning involved in the process.

And yet, the contents that they're given has been designed centrally. We're using contractors to deliver the modules they're building for us and bring subject matter experts in to make sure we get the right information in there. My program endorses the content to make sure that it has the correct substance, the correct policy embedded in the delivery.

We have gotten to the point now where we built modules for pretty much the entire rating evaluation process. And we are mapping out the entire process so we will be building the modules required to train those people under the central training process.

While we are waiting the delivery of those modules for the veterans service representatives, we have issued a field guide that all of our regional offices are using that can walk them through steps of the training process and make sure they've covered all the substance of their users, to make sure they're getting proper training.

All of that is not a new concept, it's a renewed concept. We've had something called "Ventures of the Project" 25 years ago. And it was a pretty good package. But we got away from it over the years, and we got a little bit too focused on just putting cases out and had forgotten that training and evaluating training is a full responsibility. So we are getting back to that.

We supplemented the TPSS training with the satellite broadcasts. We've done several in the last year. We had broadcasting. I did one about two weeks ago on our quality assurance program. We talked about our relationship with BVA and the written and the on-line course of computer broadcasting and discussed some of the issues before us.

We do technical issues. We've had training on women's condition, on hepatitis C. And we've also done some training letters that provide extensive background information on the technical issue. So our rating analyst have the medical and technical information at their hand as they're going through the evaluation.

As you know, medical issues are popping on us faster than we can keep up, with things like hepatitis C and AIDS and HIV. Our people are not familiar with them. So we're trying to give them training guidance so that they understand the medicine behind them, the status of the medicine before they go about the legal evaluation.

We also do workshops. We're training mid-level employees a couple times a year and really just sit down informally to discuss the issues of the day, make sure that my staff is tuned into what's going on in the field, and make sure they understand how we approach the business and how we derive the policies that we got.

That's a new phenomenon for us. We've only done a few of those. But we intend to do about every nine months or so we'll keep bringing people in and improve the direct contact between my staff and headquarters and the people who are making the decisions.

It is important to us that we have that direct contact, because if I spend all my time just talking to managers, the information gets filtered and siphoned, and it won't get the direct communications. So we're trying to build a much more comprehensive training course.

And as we go through this, we are going to require that our technicians are certified as they go through the training modules so that we can be assured that they actually do learn the skills and competencies that are required to do their job. And we're working on a certification process right now. I'm the co-chair of that with Jim Whitson from our Field Operations so that any of our skills positions will be required to complete preset training modules and training opportunities to be tested on to demonstrate that they've learned the skills before they'll be eligible to be promoted to the journeyman level job.

That's a pretty dramatic change that we're going to do for the staff. We think we need it to assure that we're getting the consistency of learning and the consistency of results of adjudicating their claims.

I know that most of you are directly involved in the process. We do have too much variance as a result of our claims process. And that's what we're trying to get out of.

We also have a staff in my office that reviews the decision reports and analyzes them, puts out to the field the decision assessment documents so that the field has an opportunity to be aware of the decisions, of course, and as soon as possible after their delivery. And those documents are available on our web site along with all our other directives and all of our other training letters so that we can get the word out to the field and keep it in front of them so that it's available.

That's the platform for what we're trying to do in Compensation and Pension Programs. Ruth is going to talk to you about a couple of the initiatives that we have going on which we feel represents good attempts to identify problems and institute some corporate language.

MS. WHICHARD: As an organization, we are trying to improve the quality of the service that we provide. And that includes improving the decisions that we make.

As Bob talked about claims, he talked about case management and looking at a claim in its totality. But a claim actually does enter into different phases. And it's those individual phases that we're trying to target and look for opportunities to improve at each of the individual phases.

We're also looking at ways to improve performance and the need for training as Bob was saying when he talked about the computer-based training initiative for individual and refresher training. We're also looking at satellite broadcast of certain issues and conference calls, as a form of education on court decisions.

But the second critical piece that we think can help are the tools that we give to decision makers. And that's the part of the group that I'm involved with.

The Systems Development Staff is responsible for exploring information technology solutions and identifying what kinds of tools are out there and available, tools that directly impact the work that the VSRs are doing to handle claims.

One of the first stages that a claim enters is what we call "the development stage." And that's where we identify what the contentions that the veteran is raising, what evidence is being cited to

us that we are responsible to request, and then what individual pieces that we know in the organization that we need (service medical records, verification of service, things of that kind).

We've been criticized in the past for missing contentions and for not fully exercising our duty to assist the veteran. We have a new application, and it focuses in on the case management and development section. And we call it "MAP-D." It is a modern award processing system, unlike the current system that we use for payment.

So, at the time that we receive a claim, we'll create an electronic record. An electronic record will be specific to the veteran and specific to the claim. The first person who touches it, the Veterans Service Representative that Bob talked about, will take that case and enter into the system all the contentions that were raised by the veteran.

This system can automatically generate a request for service medical records or for some service verification or ribbons or whatever is specific to the individual claim or issue. And then based on entries that are made by the VSRs, you can generate the request to the hospital or to the physician for the specific information that is related to the claim.

We think that this piece will help us in tracking individual claims and that issues will not be lost in the paper claims file.

What happens after that is that as each individual piece of evidence is received, the VSRs will enter the system and then update it to show you that the piece was received and when (the date) it was received.

We build into it an expert system, a rules based system that will deal with original disability compensation cases. And based on this expert system, it prompts the VSRs to answer a number of questions. Based on the answers to them, the rules are built into a system that knows what development is needed for the specific issues or the specific claim, and then it will generate requests.

Development using a rules-based system was tested in six regional offices already. The early results show that it helps improve the quality of the development phase of this particular class of claims.

While it deals specifically with original claims at this point, if the evidence shows that it really does inprove the quality of things, we'll expand the new system beyond the original disability compensation claims.

So unlike the present system where maybe the VSR repeatedly goes into the claim file and goes from the bottom to the top trying to identify what the original claim is about and all the steps taken from the beginning to the end, there's one electronic file with a snapshot that allows the person to quickly identify the claim and what stage the claim is in. I'm not saying that relieves anybody of the responsibility of going back through the claim and going through the steps himself, but it helps us streamline the system a little bit. And get the case to the next stage that it needs to be. And it also helps us, ensures that follow-ups are done timely and reduce that stage of the claims process.

The flow of the claims process means that once that development stage is finished, it moves to what we call "the rating VSR," the rating board or the rating specialist, the people that do the disability determination decision.

In that area, we've been criticized for our failure to address all of the contentions, our failure to weigh all the evidence, and our failure to document the deliberative process necessary for the decision to be made.

But one of Bob's top priorities is to improve the work that this group of people is doing. He has a new initiative which we call "rating redesign." And it's refocusing their attention to identifying those contentions, making sure that all the evidence is appropriately weighed and then fully documenting that decision, that thought process that the rating specialist goes through when they produce their final product.

The application that I work on is used by rating specialists and is a rating board automation tool. We call it "RBA 2000." And it's very different from the present application that is being used.

The purpose of RBA 2000 is to generate the written document that becomes the final decision. But this version of it is laid out to mirror the thought process that should be taking place in the decision makers mind.

The rating specialist goes back to the claim, and enters into the application all those issues that were specifically identified by the veteran.

The next stage of it would be to list all the evidence that was received or requested and not received. The next stage is to state the facts, those pieces of evidence that were pertinent to each of those issues, and then go to the analysis section.

The analysis is actually the part we're really stressing. It is the rating specialist's responsibility to consider in all the information that was previously reviewed by him, take into consideration the rating schedule, the laws and regulations that relate to issues, and then fully explain how they arrived at their decision. So it's a refocused energy to bring them back to actually documenting and supporting the final decision that was reached.

Within the application, we are also trying to take advantage of the tools. We're building an audio and a visual tool, where the rating specialist will take the results of the examination and actually put them into the tool. The application will figure out the correct percentage to be assigned. We are looking for every opportunity where we can take advantage of tools. When you do hearing loss cases, you are looking at specific results. These results, the numbers, tell you what the percent should be according to the rating schedule. This tool can help.

We also built in something that's called "tip master." As you look at certain cases, there are ancillary issues that are considered by the rating specialist at the time of the decision. Special monthly compensation, chapter 35 entitlement, competency versus incompetency decisions are a few . At the end of their decision process, there's a screen that comes up and prompts them and tells you that these special issues apply. They need to consider them further. And the application gives them

the regulations for consideration of the special issues.

Both of these systems, the rating redesign and RBA 2000 are in the midst of being deployed. We did a training session in mid August. We trained seven stations. And they are now using both of those applications. And we have a training session this week, next week, and then mid October for the rest of the country.

The training is scheduled to be a week long. We originally had it where we were doing both sessions of training, rating redesign and RBA 2000, in one week. But in the subsequent training sessions, we are going to break them into two groups. One group has week on rating redesign and another group has a week on RBA 2000.

The rating specialists will now have the one full week of training on going back through writing documents, analyzing the evidence that's received, and actually receiving training on how to write a decision, how to lay it out, and how to present their argument. Rating specialists will also spend a week learning how to use RBA 2000.

The MAP-D program I told you about is in the development phase. It will be ready in January 2001.

Well, Bob talked about the training, and it is the foundation. Of course, you have to have tools to reinforce that foundation as you go along. You also have to have performance measures to check and make sure that the process is right.

For rating redesign and RBA 2000, we'll pull cases from the stations after the training is conducted to make sure that we're achieved what we set out to accomplish.

The national programs that we have in place for performance are STAR and SIPA. Bob is going to tell you about them. They complete the circle of things--training, tools, performance measures. They help us check and make sure we've put in place the pieces to achieve what we want to achieve. So back to you, Bob.

MR. EPLEY: That's right. Clearly, the next round, I'm clearing the break room.

What we're trying to demonstrate for you today, you have the circle of events that we think does close the loop and size. We're attempting to get it to a more consistent -- we're trying to build the tools. We're trying to give the training to our people. We do have systems that we have in place or are putting into place to check our results.

The Veterans Benefits had a quality assurance program as long as I've been involved in these 16 to 17 years. It changed several times over the years. And there have been times when we haven't given it the attention that we should.

About three, three and a half years ago, a team was put together to relook at the quality assurance that we do in Compensation Pension, initially focused on the rating function. And they designed a program intended to look at the process the way veterans and claimants look at it and judge quality

that way.

That resulted in the quality assurance program that we call "STAR," Systematic Technical Accuracy Review. And we implemented it a little over two years ago after the initial tests. It is a very rigorous way of checking ourselves. Our results have not been stellar thus far. But it breaks the process into the parts of work that we think draw the most attention from the veterans and in a look at our -- we make a mistake, the STAR program ought to pick it up from an outgoing standpoint.

The basic components. Ruth already mentioned that one of our vulnerabilities is we don't always address all the issues that are claimed by the veterans or that are inferred by law. We ought to be looking at unemployability. If the veteran reaches a certain point of service connection, we ought to be looking at ancillary benefits from Chapter 35 sometimes or certain ones that are appropriate.

Those are the kinds of things that we have a tendency to miss. So one of our basic categories under STAR is to make sure we address all the issues. We have a duty to assist. And we have had difficulties with that.

The second component we look at in the STAR program is to make sure we follow the statutes to properly process and assist the veterans in getting the evidence on their claims.

We have to make the right decision ultimately. We decide the service connection in evaluation levels that are appropriate to the claim, looking at the medical evidence that is dispensable. And then we have to provide decisions and documentation to the veteran that meets all of the statutory requirements, give them the reasons and bases for a decision if we deny them. Tell them what they're going to get, if they're going to be a monthly rating. There are specific requirements and we had a hard time meeting those requirements.

Under the STAR program right now, we got results through April of this year. Our accuracy rating in the rating area for addressing all issues is 90 percent. Our accuracy for providing duty to assist is 94 percent. In reaching the right decision in evaluations is 93 percent. And in decision documentation notification, it's 84 percent. It's not as good as it should be.

The results will be published for our own people, add up all those differences, and essentially provide them with the zero defect list. And that is the compilation of all the other errors in the 65 percent. We have a ways to go to get better. But we also have a system in place now that we feel like accurately measures the work.

My staff when I came into the job in Compensation and Pension in '97 or '98 whenever it was, we didn't have anybody reviewing these cases. We now have a staff of about 10 people and that's their job, to review cases under the STAR program all day. We do about 7,000 cases every year under the quality assurance program.

The field also does their own reviews and, in fact, the way it's set up, we review cases that have been quality reviewed by the regional office. And one of the things that we try and make sure of is that we're gaging the liability of the multi review. We would like to get to the point where the local

reviewer and headquarters reviewers are finding there is hundred percent of the time at the same case.

We're not there yet. Our reliability is about 85 percent, so we have some training to do. But we have the process in place to identify the security and begin to make or fix it. And we feel comfort that we're going to do that.

About a month ago, the Undersecretary directed me to put together a quality improvement team. One of the folks in the audience has been kind enough to work with us, John McNeill, on that program. We are going about looking at the last year's data to find the most common errors and build in under the total quality improvement method to fix the countermeasures that we need to have put in place to improve our quality. And we will identify several of those under 3000 BVA leadership team next week.

Later this week, we hope to be putting countermeasures in place within about 30 or 45 days. And again, to initiate those changes. That's the kind of process we feel like we have to have on a recurring basis to get our quality where it belongs at a higher level of technical accuracy and begin to narrow the variance on our decision making on our count. That's the point.

At a local level, we are putting in place, as Ruth mentioned, SIPA, a Systematic Individual Performance Assessment Program. We have asked for and received some blanket authority to have quality review at the local levels who can assure that that's the prime component of their job, that they will be in direct contact with my office. And the policy and the rules can be explained directly to them. And we want to get enough people out in the field doing that so we can review at least a hundred decisions of every decision maker in the field.

By doing that, we hope that we can again continue to bring down the variance and move toward a more consistent outcome in our process. We're also putting in place the data integrity reviews to make sure that we are tracking the cases correctly and are recording them correctly. We do have to statistically look at our computer systems on a quarterly basis and have to kick our outliers, and things that are anomalous in the statistics in those cases kicked out to us. We look at percentages. We look at the frequencies and where necessary, we go out again to call in a special case so that we can confirm whether or not we have problems. And if we do, tell the stations involved and tell the nation what the problems have been.

We also do special case reviews on my staff as issues come up. They do come up on a regular basis, we had a group in last week looking at hepatitis C. I'm sure you're aware that that's an area of our law that's been difficult for us. There are clearly a lot of people in the veteran population are at risk for hepatitis C. We know we need to be about writing better rules. And so we did a case review to make sure we knew what's was being done in the field, what the variances are and to improve guidance, do the regulation guidance.

We have also recently done one on the well-grounded subject which is near and dear to my heart and on PTSD, because we know that there is a high volume issue. We need to learn more about how we're adjudicating those claims so that we can narrow the range of decision making adequately.

With all those kind of wrapped together, we think that we are building a fairly broad based and comprehensive method for checking our quality. And we hope in the next few years to be able to expand rather than restrict that.

We know we need more people dedicated specifically to quality reviews. We know we need more people dedicated specifically to training. And we'll try to put that into our budget request and build our organization so that they won't be easily or thoughtlessly cut. When we're under workload pressures, I got to tell you that's where we end up cutting. The tendency always is to draw everybody into direct labor. And when you do that, you cut it right down the road. We share those experiences. So with that, I will turn it over to Dick.

MR. STANDEFER: Thanks, Bob.

Let me start with maybe a couple of personal notes. I completed 30 years with the Board of Veterans' Appeals as of June of this year. And maybe about 18 of those years directly or indirectly, I spent in the quality control process. You will ask if I'm bragging or complaining. A little of both, maybe.

Anyway, a couple of thoughts from that statement I just made. One is that lawyers are not fond of criticism, particularly when it comes to the quality review process. Now, that old saw they used to lay on us in law school that went something like this: Every morning after you become a lawyer, you get up and you look in the mirror and you're shaving and there's another guy -- and I'm being gender specific, because when I went to law school, the profession was very male dominated -- but another guy will also be looking in the mirror shaving. His only purpose in life will be on that day, to tell you you're wrong.

Well, I think the point of that story was don't take any of this personally, and it will go a whole lot better. But that really doesn't apply to the quality review process when you're dealing with lawyers. People take it very, very personally.

And to understand where we are today with respect to the quality control process with the Board is -- you understand it better if you understand a little bit about our history. I'll be very brief about this, because for so many of the almost 70 years the Board of Veterans' Appeals has been in existence, we didn't really have any quality control.

Let me just stop here for a minute and digress and say Garvin. Ron Garvin, when he laid this thing on, said that you guys, meaning Group Seven, were going to have a representative tell us about your quality control process. I'm sure you got one. I'm kidding. I'm just kidding.

A PARTICIPANT: I'm clear of that.

MR. STANDEFER: Anyway, before World War II, I don't know how quality control was done at the Board of Veterans' Appeals, and I don't really care. Why should we? But anyway, right after World War II -- and this is an oral history. This is what some of the old-timers told me when I first came to the Board in 1970 -- apparently, quality control was just left up to the chief member of one of our three-member panels. And we had several of them at the Board.

I suspect that very little was done by way of quality control because after World War II and into the early 50s, the VA was overwhelm with work and the Board was overwhelm with work, too. And if any of you have ever found historically in a VA claims folder some of the old BVA decisions, circa 1948, or circa early 1950s, they used to be sometimes reports of a page, two pages, a real lengthy one would be three pages.

I would submit that this was the moral equivalent of a penny postcard which either said yes, no, or in the case of remand maybe. And I'm only being frank with you because of the gravity of quality review we had at the Board during these early years and up until modern times. I think probably this is why we have judicial review today. I can understand why the veterans community demanded judicial review.

But anyway, what some of the old-timers told me is that in the late 1950s and early 1960s, quality control was done with a committee. And the committee had bBard members that rotated in and out of it. And what they did was random sampling of completed BVA decisions and then there was a critique. And then there was great acrimony. There was so much acrimony that by the early 1960s that effort was abandoned.

W didn't get back into the quality control at the Board until about 1978. At that time, a new position was created, a deputy vice chairman whose primary responsibility was quality control.

Again, it was a random sampling process. It was primary a "gotcha" process and done after a BVA decision hit the street or was promulgated, and the only way you can correct anything was through the reconsideration process, and there was great acrimony in the process.

In 1982, I became one of the deputy vice chairmen, and one of my principal responsibilities was quality control. And the process improved marketedly. Not really. The process did change. But it was during this period of time when we were doing indexes of VA decisions, that is headnotes of decisions as we were required by law to do. We tried to do it with paralegals or other administrative staff. The job was just beyond them, so we had to assign BVA attorneys to do that job whether they wanted to or not. It was considered among some ranks to be a punitive assignment. They didn't want to do it.

In other words, we coupled our quality control process with our indexing process. As to random sampling, now if you do it by computer, that's the purest way you can do random sampling. We did random sampling in those years by indifference, or sometimes, lack of expertise on the part of our attorneys. That is, often they didn't find enough errors when they were doing the indexing to have a statistically significant sample for quality control purposes. So they just arbitrarily turned over a certain number of decisions to a staff of senior attorneys who gladly dug into the case and did, according to a protocol, a very substantial and elaborate quality review.

Again, we took names and kept figures. And there was much acrimony connected with that process. This brings us up to then about 1988. And as many of you know, three significant things happened in 1988.

The VA, that is the Veterans Administration, became the Department of Veterans affairs. We got

judicial review of BVA decisions. And our Board members were subject, for the first time, to performance appraisals. And they became subject to annual recertification in order to keep their Board memberships.

Well, our quality control process then evolved. And now today it has three elements. And I would think probably most of these elements are just about coequal.

The office of the senior deputy vice chairman, with his staff, does a statistically significant random sampling according to a set protocol of BVA decisions before they're actually promulgated so that any errors that are found can be corrected.

Now, quality control staff cannot dictate to an individual Board member what his vote should be or how the case should be decided. But we do give the Board member the opportunity to correct an error, a substantive procedural or just a typographical error for that matter if he or she wants to do it.

The Board has four decision teams from which we promulgate our decisions. Each of those four decision teams has two chief members and those eight individuals are involved very intimately in the quality control process.

Again, we have random sampling which is statistically significant and a standard protocol is used.

I also am intimately involved with this process in my office. I'm the vice chairman of the Board. Any motion for reconsideration comes to me, and I rule on all of those personally. And I also do a quality check against the completed BVA decision, although at this point, the only way an error can be corrected is if I order reconsideration of that decision. But I use the standard protocol also.

What is the protocol? Well, it is derived from seminal decisions of the Court, the Veterans Court, is what I'll call it. It's really very obvious; the elements are: issues, findings of facts, conclusions of law, reason or bases, due process matters, and also format.

If you have committed one sin, you have committed them all. What I'm saying is one error in any of these six categories means that the case goes down for statistical purposes as a failed case. It is simply considered inaccurate and is marked that way.

So I maintain that we have a "junk yard dog" type of quality control at the Board. What are the consequences then for our board members? Does anybody take this seriously?

Well, they must because as I have mentioned since 1988, our board members have been evaluated, both as to the quality of their decision making and as to timeliness. Every year then they're subject to recertification. That is, the chairman meets with a peer review committee and evaluates each and every Board member.

A Board membercan be recertified unconditionally. He or she can be conditionally recertified, or can be decertified.

Now, it's the Secretary of Veterans Affairs that ultimately has to decertify a Board member. I can't get into specifics about this. But I will assure you this process does have teeth. Because through the years, we have conditionally recertified several Board members and sadly even one Board member got decertified several years ago.

So even a panel of your friends, neighbors, and colleagues, if you are not doing what you should, will sadly but willingly decertify you, should push come to shove.

Here is the big question. I guess probably I ought to let this come from some practitioner out in the audience. But I'm so fearful it won't come forward.

By the end of this fiscal year, the Board of Veterans' Appeals intends to promulgate about 34,000 appellate decisions. We all know now what Bob Comeau told us, that about six percent of those BVA decisions are going to be appealed to the Veterans Court.

Now, a lot of them, a lot of that six percent are going to be dismissed because somebody didn't pay that $50 filing fee or because of defects in their pleading and so on. So only a small percentage of the six percent are ever going to come before a judge of the Court. But ultimately about a thousand of those decisions are going to come back to the Board of Veterans' Appeals.

Now, I have heard Chief Judge Nebeker say publicly again and again, whatever the reason for Court remands, that these amount to errors by the Board of Veterans' Appeals. So the question is, if we know who is responsible for the many cases that are rejected, why not the "paths of glory" solution? You now, why not fire somebody? Wouldn't that be a very direct way of getting quality control?

Well, having been with the Board of Veterans' Appeals for 30 years, I will assure you I've had a little fuss, sometimes a big fuss with and each and every one of our Board members from time to time. Nothing would give me greater pleasure than to fire somebody. And that would be as good a pretext as any.

But here's the problem. Our Board members, each and every one of them will promulgate between 600 and 1,000 and some more within this fiscal year. And only about a thousand total cases will be coming back to the Board. Since we have 55 Board members, if you'll do some quick math, you'll see that we don't have a statistically significant sampling to fire anybody.

The first thing you learn as a manager is that you don't threaten somebody with something you can't make stand with the Merit Systems Protection Board. What I am saying is federal personnel regulations protect our board members from people like me.

If a transcript is being made of this, let the record reflect that my tongue is in my cheek down to here. Let me quickly say I'm proud of all of our Board members. I think they do a wonderful job under often trying circumstances. But the plain truth is BVA management has always had to make some hard decisions, balancing our resources between quality and quantity. And the reason I sleep very well at night is because all my predecessors have been criticized. All those who come after me will be criticized. And believe me, we are criticized too at the Board.

So anyway, that's my story. And I'm sticking to it.

MS. WHITTINGTON: We have some questions. And as far as for the transcript that is being prepared for this, if you could identify yourself and spell your last name.

MR. KRASNEGOR: I think that's directed at me. I'm Dan Krasnegor, and that's K-R-A-S-N-E-G-O-R. And I'm a private lawyer, Wright, Robinson, Osthimer & Tatum, here in Washington. And I'd like to direct this to the Pension Service. I thank you guys for working on training and quality aspect.

My question has to do with problems that I, as an attorney, am more involved with, adequacy and accountability. The problems that I run into are that when I make an argument, and I can hear what the law says and somebody deliberately ignores that. I think it has control at the regional office -- a manager is manager -- make up evidence and things like that. And I come in and say, look, can we have a DRO review? Can you let me know what's going on with the case?

The attitude I tend to get is, well, your only option is to go to the Board of Veterans' Appeals and take a couple of years. And by that time, I'm not going to have any consequences against me, personally.

People telling me I won't tell you my name. I won't tell you what's going on with the case. The option I feel like I'm left with is to petition the Court for a writ of mandamus. We're all considering the one case, bring a civil rights action against our own employee. And I don't want to have to resort to those things.

I want to be able to say, look, don't ignore me. When I send a letter, just respond. But I don't feel like there's any support in any way about you're going to hear me. And here's what we can do on there. What can we do to try and get past that attitude problem?

MR. EPLEY: Your point is right on. And it is what we are trying to address in many things I discussed. It had been very easy for a claims examiner to become insulated and sometimes give in and sometimes stale. I think that's what you are observing. We desperately want to remove that from the system. We're trying to give people all of the tools that we can give them to make them understand the person.

It is very personal to the veterans and to the representatives that we see, because these people believe they have an entitlement and want the result worth, believe correctly that they deserve to be treated with dignity and courtesy.

We're trying to train those things. But it's real hard to train attitudes. But we're trying to build it from the bottom, from the top down to make sure that the directors of our regional offices and the managers understand that we have to bring that kind of compassion to the job.

We will be along with the things that I mentioned: formal quality reviews and reviews of interactions, phone contact and personal interviews, information where we can identify those kind of things and talk to the individual involved.

Part of the feedback process for the DRO program is the new officers program. It is intended, it is not an initial test but intended to give feedback to those people if they start off a case with a negative decision on the case.

This veteran had a history of alcohol. Where are we going to go with that? That is not the right approach to your claim. We are trying to build that out. But in terms of individual things, I can't offer you a magic bullet. Let somebody know, let the director of the office know. Let me know. We will try to make sure that you get the statistical information to deal with these people. But it's going to be a long hard battle.

MS. SCOTT: I'm Carol Scott. I do a good deal of regional office pro bono work with the fellows of our Vietnam Veterans Affair Council. That work I do out of Frederick, Virginia. I deal mostly with the Roanoke office.

I heard your statistics of 90 to 94 percent accuracy. Nobody looks at the cases that I have dealt with. I can point to one. There's one young man, a Vietnam veteran, who was diagnosed with a terminal illness. I will say that it took three weeks to get that through the office, the pension. That was the good news.

The bad news is that I have seen evidence absolutely ignored. I have been trying for the last three months to get the results from them. I have seen sight evaluations come down and they're good. I've seen competence exams that are terrible, absolutely terrible.

And in Martinsburg, somebody needs to talk to Martinsburg. The claims file routinely goes from Roanoke to Martinsburg to C&P. The claim file are mailed to Sarah Bell's (ph) office. And I have talked to her about this. The claims file do not bulge in that office until the date and time of the exam. The veterans have to carry the claim file to the examiner. The examiner has that period of time to look at that claim file and then make a report. And then the veteran carries the claim file either back to the office or to the next exam. You don't get competent work that way.

And in one particular instance, the report was typed up in 15 minutes while we waited. And it's virtually listed from the 1994 exam, which was also incompetent to the point of unethical and malpractice. Where people should be going down to the regional office on surprise visits lifting files, auditing those files, and listening, because you're dealing with veterans. You are dealing with people. How can you computerize a claim system and have any sense of what's going on with that individual, particularly the PTSD, people who cannot manage themselves? They cannot, a schizophrenic cannot possibly deal with the bureaucracy and do it effectively. The VA will find someone who is competent to deal with their own funds, but gone publicly --

MS. WHITTINGTON: If we could -- I don't know if you had a question associated with --

MS. SCOTT: The question is how do you address those issues? I have one for Mr. Standefer. The last four years I have seen probably 400 requests for records or request for your consideration. Out of those, I think, other people see the good ones that do get the decision. I seen a form letter that says exactly the same thing.

MR. STANDEFER: The truth of the matter is that we reconsider very few BVA decisions. We have a very high standard for reconsideration. It's a resource problem, because we have to employ a panel and do another decision reviewing the work again. And so very often the result is just the same, although perhaps articulated better. What you will call a cynical decision was made to use a form letter to answer many reconsideration motions. We do it because under the statute and regulations, we're not required to do anything beyond that. To do anything beyond that would be very, very resource intensive. So that's the answer to that.

MS. WHICHARD: If I gave anyone the impression that I was trying to depersonalize the process, I didn't really mean to do that at all.

One of the things that's been really hard for us in the past is to be able to answer a veteran's question when they call us to ask what the status of their claim is. And it's basically due to the kind of benefits delivery network that we have right now.

It was created back in the 70s and it is great for paying benefits every month, never missed a check. There is no way that you can update this system where we can have on-line information. This electronic claim file that I'm talking about will allow us to answer specific questions when the veteran calls us.

If a veteran calls up and says, "I filed this claim three weeks ago. Can you let me know what the status is?" We'll be able to pull up that electronic record, and anybody in the country will be able to do that. We can say "Yes, we received your claim. We asked for the records from Dr. Smith, from your hospital. We asked for your service medical records. And we're waiting for these pieces of evidence to be received."

We've never been able to do that in the past. And my whole career, we made our best estimate when we were talking to them. Often we had to tell them, "I'll need to get your claims file and then call you back." We're trying to be able to have as much information on line, to be more responsive.

And I do believe that by having that electronic record, you do eliminate some of the errors, because you're not constantly going back through a file to try and find what that claim is and then every action that was taken subsequent to that. So I do believe this will help.

I've been an adjudicator since I think I was born. And I worked under the old system when Adjudication and the Veterans Services Division were two different divisions. I worked claims. I dealt with production. And I thought I was really pretty good at this. And I had really good quality in that area.

One of the things that surprised me, one of the reasons that I really truly believe we're on the right direction was an experience I had. I didn't have personal contact with veterans, I came in every day and had my stacks of files. And that's what I did. I processed claims. But before I left Indianapolisand when I was working in that regional office, those two divisions merged. And for the first time, I got out there. I was doing outreach programs. I was helping plan and conduct an outreach program for our former prisoners of war. And it took my breath away. And when I left, tears were streaming down our faces, because we did miss that personal contact, the personal

service.

We truly had a system that did not allow the individual employee to provide good service. The case management process that we're talking about will help. If you have a problem and you're a veteran and you call the office line, we'll be able to tell you what you need to know. That's the kind of service that we are striving for. And I truly believe we are headed in the right direction. It's just going to take us time.

The structure that I grew up in, existed for such a long time. The new employees that come in now, come into this new position. They work claims. They talk to people. They do interviews. They train from the very beginning with the different kinds of philosophy. And the people that were around are learning and relearning their jobs, too.

MS. BARTLEY: Meg Bartley from the National Veterans Legal Services Program. Much as it pains me to basically attack people who seem genuinely concerned, I do have to add my two cents in.

I'm part of a team that goes around and reviews regional offices decisions for a major service organization. I have to say that we see a much higher error rate than the 85 to 90 percent that you're catching. And I want to name a few, what I see as serious problems.

One is that we are consistently informing regional office people -- from service center managers on down the line -- about CAC cases, cases that are two or three years old. They seem to especially have trouble learning quickly about cases that have come down in the past, you know, five, six, eight months, cases that are fairly recent. They know nothing about them. And consequently, they can't apply the decision to the veteran's case, to which it does seem applicable.

Often also when they do know about the case, they seem to think that it doesn't apply when, in fact, I believe, and we have, and it go to evidence that if it would go up to the BVA, the BVA would find that, in fact, the CAC case does apply.

So those are some concerns that I have, some general concerns. And I have to ask whether you genuinely believe that you have good quality review and good quality control at the regional office levels.

You explained about the systems that you have for quality review. I'm just concerned that do you really think that it's adequate? Because from our perspective of just reviewing cases, what we see is that it's not.

MS. WHITTINGTON: For purposes of the transcript, I'm going to see that the next question is one of the questions of report review, was how are general counsel opinions and CAVC opinions are distributed within both BVA and out to the regional offices?

MR. EPLEY: And the answer to that, the BVA we do disseminate precedential decisions in court assessment documents on court decisions and put them out in paper view divisions, and then we put them out on our web site. It's valid to say that not every one of our decision makers read them as

quickly as we should. The vision is to try to address them.

When I talk to our workshops and I talk to our managers, we have tried to stress is that you got to get it right down to the person who is working cases so the person's whose case that you see when you walk to the site to make sure they get those decisions as soon as they're promulgated. That is our goal.

We know we got a ways to go on that. And I would suggest to you, thank you, that the Legion and NBS, and whatever your initials are, NVLSP, but you're going out. There are at least certain organizations who go out to review cases, well, congressional staffers. There is no new people who are viewing cases for us to continually remind us when we're making mistakes. I welcome you. It's okay.

Finally, are we doing the best job? No, we're not. We're doing an awful lot better than we were a couple of years ago.

In my view, I will say it's a good rigorous review. We have a tendency just like people do in the field to get a little bit hype from time to time. And that's why when cases come for reconsideration on our site, they elaborate in the process.

If a regional office wishes to contest in one of our error results, we have a process in place where they submit the request to us. I review those and sign off on those myself.

To date, out of the thousands of cases that we promulgated, it's about 120 requests for reconsideration that we've not yet returned. There were several requests. The process is in place. It's new. And I mentioned to you earlier in my talk, the biggest problem we have is the variance.

We have a crew are processing well and who are at the top of our statistical scale. The problem is that the scale is too broad right now. I think you're finding that at your stations. I'm sorry that I don't disagree with you that you're finding problems. It's a matter of degree. I think if you and I looked at cases, there might be a couple where we disagree on and some we would agree on as well.

But the point is valid on both. We have to be doing more of the reviews. We have to make sure that ours are more statistically sound and consistent when we do have to go in. And we're doing everything we can to drill in that attitude, because that was the basis of discussion.

I welcome your suggestions to do things we're not doing. There are things we're missing. I am absolutely willing to hear your suggestions.

MS. WHITTINGTON: The opinions and Court opinions are distributed by basic county.

MR. STANDEFER: On almost a daily basis, the staff out at Mr. Keller's office -- Mr. Keller is with us today -- he promulgate court decisions. So as soon as he would get them, a fellow name Rick Thrash, who's out at Steve's office, puts a headnote on it. And it is sent electronically to all of our professional staff.

MS. WHITTINGTON: Robert.

MR. CHISHOLM: I'm Robert Chisholm. I'm the president of NOVA, C-H-I-S-H-O-L-M. This is one of the few opportunities we get to interact with you. And I just had a couple of comments and one question.

First of all, on a positive note, I have seen the DROs work well, and I applaud you on that effort and it work very well, at least, at the regional office where I seen it work.

It's the standard for quality control for those old BVA decisions that actually has the quality control RO decisions. Congress passed the CUE statute. We've had a lot of success getting some of those decisions turned over.

But my real question, and it was raised in the recent September case in the Federal Circuit called *Dambach v. Gober*, where the Federal Circuit entered that. Maybe the CAVC needs to start micromanaging the VA because of the extraordinary time delays that it's taking for these claims to cycle through the system. And I think a large part of that problem is the issue of line authority.

When the case comes down from the Court and are really under instructions, who's to see that those instructions are followed first by the BVA, and then when the BVA bring in the case to DRO, that DRO does it? And I see this over and over again in inadequate medical examination. They're being performed at the RO level.

And the problem there is no one is being held accountable for the RO that these exams are being complied with what the court has instructed and what the Board has instructed. And I have case after case where when an exam comes out, the rating decision is made. I file a Notice of Disagreement and, you know, I spit back to the RO exactly what was required and what's missing. And then the case goes back up to the Board and the Board sees it right, they'll remand it back.

And we have an aging population of veterans who are dying, especially the World War II Veterans, dying at a very high rate. And what quality control or line authority issues are you all implementing to be sure that these remands are done quickly as required by statute?

MR. EPLEY: Dick's staff and mine have been working over the last couple of years on those issues. We have not fired through that at the time of communications. We really ought to have. We understand the issue, the magnitude of the issue. We are reviewing remands within my shop on an ongoing basis to look through those kind of trends and put out guidance to the field where we can at least formally educate them on the proper way to do business.

There has been case law, I'm sure you are aware of it, that has chastised us for trying to resolve a case before we actually finished all of the mandates in a remand, thinking that we had substantially resolved the issues and we can get things done. But we obviously can't be focused clearly.

That kind of cultural approach has to be fundamental in turn, and we know it. We're trying to get the directives out to explain it. We're doing it in our training classes. We do have it in the modules. But it does need to go down to the individual level. We hope we will get that through our local SIPA

review.

The line authority in my organization rests with the Office of Field Operations. Rick Nappi, the Deputy Undersecretary for Field Operations, he and I are in regular communication on the issues where we need to tighten up. He is aware, and he's trying to build these processes so we can get down to the individual cases. You got to say, look, that's not the right way to do it. That's where we got to get better. We are not doing these cases right. But we're trying to get it from the top down and then build it at the field level as well. It takes time.

MR. FREYER: I'm Frank Freyer, F-R-E-Y-E-R. I'm an attorney. I work for the county government. First, I'd like to thank you for doing it right the first time.

Take this down because it might work. One of the suggestions I would make is that a few months ago, I requested -- and maybe you should go see the employees out there, the regional office -- you know when you got a problem rating slip up there and several weeks and you haven't picked them up. The suggestion I have is one with the practitioner -- possibly you should allow me to try to get you in there. Two ESOs you shouldn't have that problem. And that's in the claims office.

The specialist in the regional office, have them rate the rating specialist to see which ones that don't want to handle any cases whatsoever. We found that to be mostly in the field consistent. That's the biggest problem I see happening. And some of the people are seniors, and they're training newer ones coming in the office. That's a regional thing to think about.

MR. EPLEY: To the extent that's true, there never should be a situation where -- yeah. I'm not doubting your point. But if the practitioner at the local level were told, say, I never want Epley to rate my case, that's just disgusting. That on the face, it's not working. We have a situation with personal accountability.

MS. WHITTINGTON: Sean.

MR. RAVIN: Sean Ravin. The last name is spelled R-A-V-I-N. My question is what is it? Could you elaborate on your plan? I'm an access -- I'm an attorney representative here to your electronic system. My fear is that the audiovisual files and your other files will not be a part of the claims file. And I'd like to have access to everything in the files that you have including your electronic file, so if you can elaborate on that.

MS. WHICHARD: The audio visual piece that I talked about in the employee's electronic file is not really in the file.

MR. RAVIN: But I'd like to have access to everything that goes before the Board.

MR. EPLEY: One of the things that we're trying to do we're working on a partnership trial basis. We're trying to put training responsibility involvement in the preparation of claims. We've been working primarily with a National Service Organization in this. But its intent is to provide training on the way we do our business and offer it to the stakeholders and count on his involvement as well. Believe me, you're welcome in that process.

But one of the results of that is the people who go through that and certify completion to that, we will give them access to the MAP process that we use that will show current status on veterans claims issues. We want to exploit that information. We want to have some consistency to it. But we're willing to give that to you.

MR. RAVIN: You're willing to provide access to everything you have?

MR. EPLEY: I don't think I said that.

MR. RAVIN: No, you didn't. But if the court level in the feeling, you have your claims files that are already designated areas in the record, so we want to have access to all documents.

MR. EPLEY: I don't think that out of the MAP we're going to be building documents pretty much as, you know, like a pending file, status of cases pending. It won't change, embellish, or alter the records in the file of the permanent record.

MR. RAVIN: But I don't understand why you said that some are under current records and some aren't. If an RO writes down a decision of rating, why can't we see it?

MR. STANDEFER: That will be in the file. There's nothing in the electronic file that's not in the paper file. It's just a quicker version of what the status is. You'll be able to look at the original claim and know what contentions were raised. You'll be able to look at every letter that was generated from a physician or for a hospital to service medical records request, see when it was requested and then date stamped. It doesn't replace anything.

MR. RAVIN: So everything that's in your electronic file will be in the claims file?

MS. WHICHARD: Yes.

MS. WHITTINGTON: And with that, we are going to have to close up. If anyone has a specific question that you would like addressed by the panel, it will be in the transcript. This session is repeating at 1:30 this afternoon.

If you give me that question, I will ask the panel in the second session, and you'll be able to read it in the transcript.

UPDATE ON SECTION 5904 FEES AND EAJA ISSUES

Moderated by Ms. Cynthia Brandon-Arnold

MS. BRANDON-ARNOLD: Good morning. My name is Cynthia Brandon-Arnold. I'm a staff attorney with the Central Legal Staff. It's my pleasure this morning to introduce the panel.

If you're not supposed to be in Update on Section 5904 Fees and EAJA Issues, this is your time

to exit. Does anybody want to leave?

This morning we have Mr. Ron Garvin, who is Assistant General Counsel for Group VII of the VA. He assumed the position in August of 1995. I'm simply reading from the biography, so if you haven't had an opportunity, this will give you an update. He has 34 years of federal service spanning many assignments and a wide variety of progressively complex Government service. Here's to you, Mr. Ron Garvin.

Mr. Barton Stichman is a joint executive director of the NVLSP, a public interest law firm that specializes in veterans law. He has served as NVLSP's director or co-director for most of the period since 1981 when NVLSP was formed.

Julie Clifford practices law in Alexandria, Virginia. She's been practicing law since 1993, veterans law -- I'm sorry. When she took her first case through The Veterans Consortium Pro Bono Program.

So this is the panel today, and they are looking forward to your questions. Mr. Ron Garvin is the chairman.

MR. GARVIN: As the chairman, I get to go first so I can set the tone. Actually, what I hope to do is give you a very brief introduction to the subject by myself, then turn it to Bart, and then to Julie. At that time, we'll try to field as many questions as we can from the floor. I want this, as much as possible, to be a very interactive session so that we don't avoid any questions or sidestep any questions and hopefully come up with some good answers. In the meantime, though, if you feel compelled overwhelmingly -- like you're going to have a heart attack if we don't answer your question -- if you'll impose it on us, we'll see if we can address it before we move on.

The first thing that I want to talk about is the 5904 issue. Those of you who are in the practice, I think, are probably aware of the *Scates* decision, which came out recently. *Scates* talks about withholding under the current regulations in VA. And the question, I think, is going to be for most private practitioners: What is the status of regulations we've heard about which will impact the VA.'s duty or responsibility to withhold 20 percent of past-due benefits?

I'm going to give you a history on that as I understand it. Remember, when I say "as I understand it," I'm not talking for the Secretary nor for my boss, the General Counsel. I'm talking to you as a government attorney, and I'm giving it to you from my perspective.

As best that I can recall, it was nearly a year ago when the proposed regulations were raised from C&P Service. Essentially, the suggestion was, at that time, that we ought to reexamine whether or not we should be in the business, or perform the service for attorneys, of withholding 20 percent of past-due benefits so that when the award became final, it would be turned over to the attorney who had the fee agreement.

The discussions were pretty hot and heavy with NOVA, and I think we got a lot of input from those who were practicing on the other side of the bench, so to speak. It appeared, under Secretary West, after many discussions, that the Secretary was about to accept the recommendations that the

language in the statute, which says "you may withhold," would be converted by regulations to say "we choose not to follow the '"may."' We've been doing it in the past, and we're going to get out of the business of withholding that amount from past-due benefits to pay over to the attorney. It looked like that was going to happen almost immediately. Well, under that particular administration, the regulations weren't written and they weren't signed, and a lot of things have happened since then.

The latest that has occurred -- the proposed regulations were published in the Federal Register, and we had comments on them. There were lots of comments. It's my understanding we got more comments on attorney fee regulations than any regulations that the VA has actually proposed over recent memory.

Again, they went through those comments, came up with our analysis. The analysis has been between General Counsel and our counterparts over at C&P Service. The Board's been assisting in this as we assess all of those comments. We are in the process where the analysis of those comments may be coming to a conclusion. If that occurred in a reasonably, what shall I say, efficient manner, or what have you, we would expect to see the regulations placed on the Secretary's desk, certainly, before the first of the calendar year.

Now, this is a new Secretary. My understanding is, under Secretary West, he was about to sign off on the VA's position that we would get out of the business of withholding. I don't know what Acting Secretary Gober is going to do. Quite frankly, your guess is as good as mine.

I'm going to leave my discussion of 5904 at this point. We can develop it in greater detail during the question and answer period.

The other aspect of which everybody is interested is EAJA fees. How do we handle them? What are we doing with them? I'm going to give you a government lawyer's perspective on that also.

I think that you private practitioners feel you're following the established principles in law. We think we're doing it also. And what we're trying to determine is what is a reasonable fee for the work that's performed. There isn't a whole lot of guidance -- well, there is some guidance, some guidance, in the court's law.

What we think, from the government attorney's perspective, however, is there is a great void in real direction as to what is and what is not a reasonable application for those fees. And that's when we, meaning the government, and the private practitioner get into a contest as to what is reasonable, what's required by the application, and all of those things.

From the Government's perspective, I'm going to state it, and I'm sorry, I should have said this ten seconds earlier because now the judges are in the back of the room and they're going to hear this. But from our perspective, we see the court's failure to step forward and give us a real road map, so that both private practitioners and the Government attorney can know what is expected in a fee application, so that we get out of the contest as to reasonableness. That's where we are really drawing the line.

From our perspective, from the Government's perspective, let me tell you what happens with an

EAJA application. This is getting into the nuts and bolts. I'll do that and then pass it on to Bart. Everybody's application for EAJA fees that reaches the Government, Group VII, is examined, first of all, for all of the jurisdictional requirements. Once we get over that, we're looking at what's reasonable under the -- as we see it, under the circumstances of the law, the totality of the circumstances for the fee. I guarantee you this, every application that hits my desk is opened, and I look at the affidavit that's submitted by the attorney, and I go through those line by line. I know you don't make a line-by-line weighing process, but what I'm looking at is: Was the effort that was put into the preparation of the case adequately shown in that application so that we can make a reasonable determination that the effort expended and the results obtained by the attorney warrant the fee that's requested.

I'll tell you, for this audience, quite frankly, those applications that hit $5,000 and less -- they don't get nearly as close a scrub as do those that exceed the $5,000 fee. That's not saying if it's under $5,000, you get paid, because we do look at those also. But they're not going to get nearly as great a scrutiny as the other ones. In that process, when I look at those, private practitioners are probably well aware you'll get called saying the boss is questioning A, B, C, or D. And that's true; I am. And when they talk about who's questioning them, it's me, because I'm trying to establish through what the Government does uniformity in all applications.

In the *Cullens* argument last week, Judge Kramer, in one of his questions from the bench, suggested that nearly 30 percent of his effort is now involved in fee litigation. I just want to confirm that. Because the statistics that I keep for Group VII of the number of cases coming in, and we are expending about 30 percent of our efforts on attorney fee matters. And that's a question now of resources. Are we going to continue to do this? Is the court going to help us by giving us a good road map so that either you are not confused, or are we timid about doing what we're doing? We're all doing what we think is the right thing. All we have to do is find a common ground.

This is an adversarial proceeding now that we have a court. But the adversarial aspect of it, I submit to you, should be in determining whether benefits should be awarded to veterans, not to us, as attorneys. As we increase our focus on attorneys fees, I think we're getting away from the real objective of this court and this practice.

And with that, I hope I've generated some questions in your mind, and I'll certainly be more than happy to address them when we finish our presentation. Next, will be from the perspective of Mr. Bart Stichman.

MR. STICHMAN: Ron's asked me to try to limit my remarks to five minutes so we can have the majority of the session be questions and answers, so I'll endeavor to do that.

What I'd like to discuss in my allotted time is to alert you to the *Cullens* case that Ron mentioned. Substantial justification is the biggest hurdle in an application for attorney fees under the Equal Access to Justice Act. And as I'm sure you know, in order to make that determination of substantial justification, the Court looks at the administrative position of the agency and the VA's litigation position in court. But I think it's fair to say that in by far the majority of cases in which the Secretary does not sustain his burden on substantial justification, it is the administrative position where the Secretary has failed to sustain his burden. That issue really involves an analysis of the

reasonableness in fact and in law of the Board of Veterans' Appeals decision.

The question in *Cullens*, and it's been a question addressed in the past precedents of the Court, is: What administrative position should the court be looking at in cases that are settled by the parties by a joint motion for remand or a settlement agreement?

And the past position of the court, particularly in joint motions for remand, are exemplified by *Dillon*, 8 Vet.App. 165, a 1995 decision, and many other cases which hold the same thing. Only the errors addressed in the joint motion for remand are subject to scrutiny for lack of substantial justification.

I posit that that it's unfair and inconsistent with the purposes of the Equal Access to Justice Act to have such a rule. And let me give you a paradigm example of that. Let's say the case involves a *Karnas* remand. As I'm sure you know, the law established in *Karnas* a long time ago, 1991, and it's still followed today, that if there's a change in the law and regulations governing a claim at any point in the process, even at the judicial review level, the veteran is entitled to application of the most favorable version of the law. So there are many cases over the years in which, after the Board of Veterans' Appeals issues its decision, for example, the law changes and that results in what I'm calling the *Karnas* remand.

So let me take an example of that to illustrate my point. Let's say the Board of Veterans' Appeals, in my example, denies a request for a rating increase in a mental disorder. The veteran appeals that to the court, and after the BVA decision the VA changes its rating schedule for mental disorders. That happened three years ago, as I'm sure you know. And, so, the question arises whether the veteran may be entitled to benefits, an increase in disability rating under the new rating schedule, even if he didn't deserve it under the old rating schedule. Let's assume in this case that the BVA decision denying the rating increase under the old rating criteria contain reasons and bases errors and the failure to comply with the duty to assist.

Now, once the rating schedule changes after the BVA decision, the likely result is that Mr. Garvin and the General Counsel Group VII is going to say let's remand this. This is a *Karnas* remand. And that's very attractive to the complainant because the Court would vacate the Board of Veterans' Appeals' decision, and it's sent back to decide whether the new regulations are more favorable or not. And all these errors below, like the duty to assist and failure to provide reason or bases, can be argued and perhaps corrected. So if one wants a quick result, as most claimants do, the right course of action in most cases of that type is to agree to a joint motion for remand due to *Karnas* and a change in the regulations.

But what *Dillon* and its progeny state is that if you agree to that type of joint motion for remand, the only substantial justification issue in a subsequent fee application is whether it was reasonable for the Board of Veterans' Appeals to deny the claim under the old rules when there are now new rules. How could they have anticipated the mental disorder rating schedule changes? Obviously, that's not an error that the BVA made, and that's the only issue contained in the joint motion for remand. So in that type of case, if all you're looking at is the error, so to speak, addressed in the joint motion for remand, is the Secretary will prevail on the substantial justification test because you can't charge the BVA with being unreasonable for failing to decide a claim under a rating schedule that

has yet to come into existence. But the reason this case was appealed is because of the unreasonableness of the BVA's decision under the old law. That's why the veteran had to, perhaps, obtain a lawyer, and the lawyer had to analyze the case, review the claim's file, and file a Notice of Appeal. The veteran's attorney, likewise, cannot be blamed for all the time that he or she had to put into the case to bring it up. He or she didn't know it was going to be an easy remand because of the change in the rating schedule. And plus, they had to appeal it to prevent it from becoming a final decision that would have eliminated the possibility of the remand, and keeping the earlier effective date for analysis of the issue of what the proper degree of disability is from the date the claim was filed. So that's what I think is the terribly negative result of *Dillon* and its progeny.

Now, the Court, to its credit, in June decided a case called *Cullens* in which it decided in the context of the settlement agreement to revisit that entire issue. In fact, the panel that issued a decision, which it vacated the same day, expressed their views, the panel's views, on this issue that I've just been discussing. There were two judges who agreed with the sort of analysis I think the Court should follow, and there was a dissenting judge.

But it doesn't really matter because they vacated their whole decision and set it for en banc consideration, and the en banc oral argument was held last week. You should look to see what the results will be in the future, because the Court is going to be issuing a decision either keeping their current case law or changing it, or perhaps a combination of both. So that's a very important issue to a lot of practitioners because they get beat out of fees contesting an unreasonable BVA decision because of the so-called *Dillon* rule that you only look at what's in the joint motion for the remand or the settlement agreement to decide whether the administrative position of the BVA is substantially justified.

This is not only important in a few *Karnas* remands. It might become very important if Congress passes this legislation that's currently in conference, getting rid of the well-grounded-claim requirement as a threshold triggering for a duty to assist. If that passes, the Court is going to be remanding a great number of the appeals that are currently before the Court, and that's like a *Karnas* remand. Here, you have Congress passing a law after these BVA decisions were issued, and it really directs that many cases go back to the VA if the legislation stays the way it is. And a lot of lawyers have put in a lot of time on these cases not knowing the statute was going to be passed. But it looks like one will, and if the court sticks with the *Dillon* rule, there will be no attorney fees paid due to the lack of substantial justification in the position of the BVA. Thank you.

MS. CLIFFORD: Recently there was an article in the Washington Post about robots. Twenty years ago I thought by the year 2000 I would have a robot in my home to do the cleaning and cooking and and mowing. A couple of years ago, I thought these attorney fee issues would be resolved too. I thought I would have an agreement that I was comfortable with and that I would know how much I would be paid. But, of course, today, I have no robot in my home, and I am still baffled about what kind of fee agreement to have, and there is not necessarily any predictability about the amounts of fees or how they will be calculated.

The particular case that I wanted to discuss today is the *Swiney v. Gober,* decided on August 14, 2000. It was an unusual case, withvery limited circumstances. The veteran's attorney asked that the case be consolidated with another case, *Quigley v. West*. When that motion was denied, he filed an

amicus brief in the *Quigley* case. The Court decided the *Quigley* case favorably for the veteran, but not on the issue in *Swiney*. The attorney then used much of the language in his amicus brief for his brief in *Swiney*. The attorney requested feesfor the time he spent on the amicus brief, and the court said, yes, because of the very unusual circumstances.

Initially there had been negotiations with the General Counsel's office for a remand. When the parties did not agree on the terms of the remand, the General Counsel's office filed a motion for a remand. The attorney opposed the motion and asked for reversal. The Court reversed on one of the issues, and remanded another issue.

As to the EAJA fees, the Secretary conceded that the appellant was a prevailing party. I think when the Court asked for supplemental briefings, the issue came up regarding whether the appellant was a prevailing party. Ultimately, the court, in a decision written by Judge Steinberg, decided the appellant was a prevailing party.

The issue that concerns me is that Judge Holdaway wrote that he thought the appellant was not a prevailing party because the Secretary had asked for a remand, and the Court granted a remand. He said the Secretary was the prevailing party. The appellant was not a prevailing party because the appellant argued for a reversal, but got a remand.

What was not clear to me in this case was whether the *Swiney* attorney, in his brief, had argued for a reversal or, in the alternative, a remand. I'm not sure if that would have made any difference.

Judge Holdaway, in his dissent, said he would have found special circumstances in this case and denied the fees that were incurred in writing the brief because they were incurred in objecting to the remedy ultimately granted. He thought the Court would be granting a license to attorneys to incur EAJA fees when there was no hope of actually obtaining the relief sought. And he urged the Secretary to request an en banc decision "in this egregious case."

Judge Nebeker, in his concurring statement, stated he thought that so long as there was a basis for a greater remedy that was not frivolous, seeking that remedy was consistent with counsels' professional obligation.

However, as you know, Judge Nebeker will be retiring. The Secretary so far has not asked for the en banc decision in the case.

The issue came up again during the oral argument in *Cullens v. Gober* this past week. During that argument, Judge Kramer said he was not convinced that the appellant was a prevailing party.

The other issue that came up was a comment that Judge Steinberg made regarding attorneys' fees. He asked Randy Campbell if the Secretary would object to a Court rule that required a statement, before the clerk dismissed the case, that the EAJA issues had been resolved. Randy Campbell said the Secretary would not object to that. There was no more discussion, so I don't know if such a statement would apply to the amount of the fees as well as substantial justification and prevailing party status. One of the judges commented that whether or not you're a prevailing party is a jurisdictional issue.

One disadvantage would be that many attorneys would not want to be in the position of saying I'm going to give up two hours if you grant a remand on a thoracic claim.

That reminds me of when I used to do divorce cases. The parties would be arguing about who gets the wineglasses, and finally, the attorneys would get together and say, we'll buy you another set. But that won't resolve it because the parties want those wineglasses. I don't think we want to be involved in those kinds of situations.

MR. GARVIN: Okay. Do we have any questions? Or what questions do we have, I should say?

MS. CLIFFORD: I have a couple of other comments. Judge Steinberg's comment obviously was meant to get to the issue of the time spent in court on fee agreements. I think we're all aware that it is a problem. One reason is because of the aging population of the veterans. I think the VA says 1,500 veterans die a day, so time is certainly of the essence. The time we spend on EAJA litigation is important and allows the veterans to be represented, but it does take away from substantive issues.

In addition to using the rules or other methods to improve this situation, NOVA sent a letter to Robert Epley and other officials concerning how *Scates v. Gober* will be implemented. The veterans service organizationsmeet with the VA regularly on a number of issues. It's my impression that the private bar does not meet regularly with the VA. I was wondering how you are going to respond to that letter requesting a dialogue?

MR. GARVIN: I'm going to be so presumptuous as to speak for the General Counsel. Quite frankly, I'm not sure that that issue has been raised. So now that you raised it, I'll go on record and say we will take steps to include the private bar in those discussions with General Counsel, they are on a, I think, bimonthly meeting. We just had one the same afternoon as the *Scates* argument, as a matter of fact, and the next one, I believe, is in November. I'll see that the General Counsel does something to ensure private parties are represented also.

AUDIENCE PARTICIPANT: I know Tom Roberts is here, and I don't mean to put you on the hot seat, Tom, but I was wondering if perhaps someone from the Board could explain what their response to the *Scates* decision will be. It's my understanding that perhaps they're planning to put a hold on cases or that they're going to dismiss all of those 5904 cases. Could you kind of comment on that?

MR. ROBERTS: Yeah, sure. I'm Tom Roberts. I'm the chief counsel for the Legal Affairs Board, and one of the things I do is the attorneys' fees.

MR. GARVIN: Tom, if I may interrupt. Make sure the reporter can pick up your comment.

MR. ROBERTS: Basically, you're right. In light of -- *Scates* was pretty clear that the board did not have jurisdiction to make original decisions in questions about whether or not an attorney should be paid a fee out of past-due benefits. What we've done is, effectively, we're no longer making those decisions. The cases that we had in the pipeline or the few that were actually decided on after August 14th, we were basically dismissing them.

We are working now with BVA, with the Veterans Benefits Administration, to try and pass this task on to them. I guess that's probably about the most I can say about that right now, that we're working with them. I don't think there's been any clear decision made about exactly how the BVA is going to implement it. We're certainly willing to work with them. We've been working with the General Counsel's group, too.

But the answer to your specific question for right now, cases in the past that would have come up to the Board to decide whether or not a fee should be paid out of past-due benefits are not going to be coming to the Board, and the ones that we have there now, and I think we've got -- I think we had about 40 in the pipeline, we're dismissing and sending back to the VBA. And we've also -- going back to Julie's point, we also have a copy of NOVA's letter to Bob Epley, and we're certainly willing to participate in any kind of dialogue that may arise out of that.

AUDIENCE PARTICIPANT: Do we have any time lines for preparation of procedures or instructions to the ROs as to what they're supposed to do when they receive these cases back?

MR. ROBERTS: I'm not aware of any. We've been, if you want to say, fortunate enough to be able to work with the private bar for about eight years. We've tried to be helpful, and I'm sure -- I see my brother Carpenter dissolving into laughter. We understand the importance of it, and both J.B. Love and myself, who work on this thing, used to be in private practice and understand that money means something. You've got to pay rent, and you've got to pay salaries. We are encouraging our brethren in BVA to move with some dispatch on this thing for that reason. We figured there's probably about -- in the cases in the pipeline, there's probably about $700,000 that belongs to either a veteran or an attorney, and that's real money, and we'd like to see it get put out as quickly as possible, and we're working on it, but we don't have a specific time.

AUDIENCE PARTICIPANT: So on these dismissals, the next step is to go back to the regional office?

MR. ROBERTS: The question is: On these dismissals, the next step would be to go back to the regional offices?

From our perspective, at this point, the next step is to go back to the Veterans Benefits Administration. Precisely how they're going to handle these cases is a matter of some discussion right now. Whether they would handle them at the individual regional offices or they would somehow centralize the function. But, yeah, they'd leave us and go to Joe Thompson's house.

MR. GARVIN: If I may just talk about an administrative point here, when you ask a question, would you identify yourself so the reporter can get it in the record.

Ma'am, yours was the first question.

MS. SMITH: My name is Cindy Smith, and can I just, without monopolizing the floor here, ask a question to follow up to you, Mr. Garvin?

MR. GARVIN: Sure.

MS. SMITH: I have an attorneys fee case, 5904 case, pending at the Court, and because of the *Scates* decision now, what is the General Counsel's official position, if any, with regard to the effect of this case decision on -- the Board's decision regarding fees? Are we going to move for joint motion to dismiss my appeal?

MR. GARVIN: That, I don't know. I don't know the facts of the case. But you can be assured that the responsible attorney will be looking at it real quick.

MS. SMITH: If there's no underlying decision for the Board's decision, that would seem an appropriate response.

MR. GARVIN: Mr. Roberts says, yes, it would. I'm not making any decisions until we actually look at the case and consider it.

Mr. Leonard, do you have a comment?

MR. LEONARD: Basically, we've been moving to vacate and remand those decisions. And I think our attorneys have been contacting all the counsel in the cases. If you've been skipped over for some reason, please call the attorney involved.

MS. SMITH: I have an answer in my case, I was just putting it out as a hypothetical for other folks as to what may be happening in their cases.

MR. GARVIN: Mark Lippman, do you have a question?

MR. LIPPMAN: I do. It deals with aspects of the *Cullens* case, and that is that the private bar, when they take a case -- generally, they evaluate and identify an error that was submitted by the Board. And then midstream in the appellate, midstream, there might be regulations or case law that changes the law. And, typically, that gives rise to the *Karnas* remand.

For example, in the *Hodge* decision, that was a perfect fact pattern where the General Counsel, what I believe, took a policy filing either joint motions or motions to remand strictly on that point. And I'm wondering if General Counsel, assuming the *Cullens* decision is adverse to the private bar, is willing to take a more individualized assessment of these cases. I mean, some of the decisions that are taken up involve cases that -- issues that are clearly obvious, and I'm wondering -- and would entitle the attorney to EAJA fees, and I'm wondering is that fair? Is that in good faith? Is this due to policy where you'll just do a unilateral motion or joint motion if private counsel agrees just on the limited *Karnas* remand?

MR. GARVIN: The policy from our office is, we look at the entire case and the status at the particular time. When we have a new decision that comes out from the court, or regulations or what have you, that are going to affect cases, we have a weekly management meeting in Group VII. Iin that meeting, we'll put out what we think is the holding or the impact of that case. And then each of my deputies go back to their team meetings, and we'll again indicate what the effect is and ask

each attorney to individually look at their cases.

Now, at that point, if it appears from what we have that is a single issue, easily remanded, we're probably going to initiate action on that. So if there are other issues that are pending, I think it's incumbent upon you as representatives of the veteran and yourself, in an indirect way, to raise those issues. So if there is a remand, it's not a single issue, no-fee remand.

MR. LIPPMAN: The thing is, that delays the adjudication process of the case. In other words, I want to know, is your office open to entering joint motions, but not only to the *Karnas* remand in those cases, but also issues that are clearly identifiable from the BVA decision? Or will you just do a narrow policy of just remanding cases on the *Karnas* issue? That was my experience with *Hodge*, that attorneys were not open to include any other issues in a joint remand motion. We had to file a brief or some kind of responsive pleading to protect our rights to argue EAJA fees on other issues. I don't know if you want to go on record on that.

MR. GARVIN: I'm not familiar with the individualized cases, but by and large, if we're drafting a remand, it's because our review of the case would indicate to the action attorney that it's only a single issue case. And you may look at it as slowing the process down, but we look at it as if there are additional issues, you should raise them so we can get everything included in the remand.

MR. LIPPMAN: So, and I'll leave it at this, you'll leave that discretion to your individual attorneys, that if they believe there are other issues other than the *Karnas* issue that warrant a remand, you'll allow them to include that in the joint motion?

MR. GARVIN: Not necessarily allow them, but I want them to examine it. And if there's perhaps a difference in opinion, they will discuss it with their supervisory deputy. And if it turns out it's one issue and the deputy agrees it's only one issue, it will probably go that way regardless of what the acting attorney may think. But they're certainly not going to disregard it. Like, you have your cases, and you prepare them the way you think is best for your client and yourself. Well, the Government attorneys do the same thing.

MR. LIPPMAN: It's just my experience, and maybe it's my perception or misperception, but in the *Hodge* context, where you had a number of remands under the *Hodge* decision, attorneys were just not open to discussing any other issues other than the limited *Hodge* remand. To me, that's kind of like a policy. I know it probably wasn't in writing, but I'm wondering, are you going to take that sort of part --

MR. GARVIN: Let me just give you some factors that were prevalent when we did *Hodge* that are no longer present. At that time, we had about -- and these numbers are not exact, but they're reasonably close -- we had about 25 or 27 appellate action attorneys who had a caseload that was approaching 100 to 110 active cases per attorney -- and, yeah, we probably did do some a little quicker than we would today -- here the average active caseload we're trying to keep them down under 50.

Bart, you had something?

MR. STICHMAN: Yes. I wanted to follow up with Mark's point. Let's take a case where there's a *Karnas* remand, or at least that's the issue that your office raises, and the original reason that the appellant's counsel and the veteran filed the appeal was that the VA didn't get social security records, even though they knew that they existed. And, so, perhaps what you're saying is your office will consider putting that in the remand as well. But let's say your office disagrees that the BVA decision was wrong in failing to get the social security records and there's a dispute between the parties, but your office is willing to remand, just on the sole issue of the *Karnas* remand. If you just agree to the *Karnas* remand, wouldn't that assistance issue be preserved on remand, regardless of whether you addressed it, to complain that the VA should get those social security records, or does the fact that it's not in the remand mean it's abandoned?

MR. GARVIN: No, I don't think the issue is abandoned. Anytime there's a remand back to the Board, I think under *Kutscherousky*, other aspects of the case are preserved, and you can present additional evidence and raise new issues, actually, before the Board when the case is back up for reconsideration.

MR. STICHMAN: Let me follow up on that, then. Wouldn't only a fool not agree to a *Karnas* remand, then, rather than litigating in court whether the social security records should have been obtained? Because it's going back anyway, and you preserved the issue, and, in fact, you can go out and get the social security records yourself.

MR. GARVIN: No way am I going to touch that! I'm not going to call anybody a fool!

MR. STICHMAN: So I'll call him a fool, and I'll say that the guy is not a fool if he agrees to that joint motion for remand. Now, I understand your position in *Cullens* is that in that situation, the veteran, the appellant will not get attorney fees because the Court doesn't have the authority to review the reasonableness of the failure to get the social security records as part of the substantial justification argument. Is that your position?

MR. GARVIN: Well, I think the view of the Government's position is perhaps different in the eyes of the beholder. What we argued in *Cullens* is that the decision is based upon the record, whatever the record is at the moment of remand. Unfortunately, in *Cullens* there was no record. And I think that's what the Government argued. The record consisted only of the BVA decision and the settlement agreement itself. That was it at that point.

Now, the position of appellant's counsel, I believe, is that since the BVA decision was based upon the record it contained in the C-file, the entire record was before the court. So we have a difference of view there.

MR. STICHMAN: I guess what I'm asking is: Do you think *Dillon* was correctly decided? Do you support the continuation of *Dillon* or not?

MR. GARVIN: The Government takes the position it should be decided on the record as it exists.

MR. STICHMAN: You're not answering the question. Is the record only the issues addressed in the joint motion for remand or is the court required to go beyond that and entertain allegations that

the BVA decision was unreasonable on issues never addressed on the joint motion for remand?

MR. GARVIN: No. Our position is the record is the filings of the record at the time the remand is entered into. It's nothing outside that record.

MR. LIPPMAN: Does that mean you can go outside of the joint motion?

MR. GARVIN: Yes. As long as there are other pleadings which constitute part of the record.

MS. SMITH: So, in a sense, isn't your position essentially forcing the attorney, fool or not, to file a pleading in lieu of accepting that joint motion?

MR. GARVIN: It may very well be.

MR. LIPPMAN: The problem is that the case that extends *Dillon*, and it's a case called "*Jackson*," which says that an attorney can only argue, if he decides to brief the case and can't agree with the terms of the joint motion, you can brief it to protect issues you want to argue for EAJA fees. If the court decides an issue, only on one issue, that is the only issue you can argue for EAJA fees. So what happened is, if you filed in the *Hodge* case, if you decided to challenge the Government's unilateral motion to remand just on the *Hodge* and *Karnas* and other issues that you thought the BVA committed, the court wouldn't even consider those issues, just remand on the limited *Hodge* issue, and you couldn't argue fees.

MR. GARVIN: I'm not sure about that. I think your interpretation is somewhat narrow, but I can't equivocally say that you're not correct. There are other aspects of what we're talking about here. Now, you have to bear in mind, at the court, it is an adversarial proceeding. Counsel for both sides have positions. By and large, most of our controversies are resolved in the pleading or the negotiation stages. Quite frankly, if we're negotiating, that's not part of the record, so you do have to look at that aspect of what the *Cullens* argument was about.

MR. LIPPMAN: Is the record on appeal as part of the record, or is it just the pleadings?

MR. GARVIN: The record on appeal, if it were filed, would be part of the record, right. See, there was none filed in Cullins. There was no record of appeal ever filed. The case was settled before a record was developed.

MR. LIPPMAN: Just so I can understand, when you're going on record, generally, the file is -- the record of appeal is filed by the time you enter negotiations. That's generally the way I understand it.

MR. GARVIN: Ninety-nine percent of the cases.

MR. LIPPMAN: You're saying that the General Counsel's position is, you can look to that record to argue EAJA fees, even though it's not included in the terms of the joint remand. That seems to me the only --

MR. LLEWELLYN: This is Adam Llewellyn saying, not under the case law that *Dillon* prevails.

MR. GARVIN: Yes, Adam Lewellyn, an attorney with Group VII.

MR. LLEWELLYN: I'm only speaking as an action attorney. The problem here is that, since day one, people like me have only been interested in disposing of a case with the best interest of the veteran in mind. Because of the Court's reluctance to give us a road map on how to proceed in true agreement matters, we're having this discussion here today. And there are issues that need to be resolved, and the private bar has their interest in pursuing these issues. And as I see it, the only way to make progress in this area is to negotiate. If a case is arising where it's an obvious *Karnas* remand -- you need to know in *Cullens*, and I found out in *Cullens* that there is a rate change in *Cullens*; that the BVA decided the case, and it resulted in the denial of benefits. While the case was on appeal, the rate changed, eliminating the roadblock that caused the denial. So with that roadblock gone, the grant of benefits was obvious. So a remand was unnecessary. Which is why we settled the case, because that expedited it for the veteran. Unfortunately, the attorney got lost in the process because he didn't think that we would contest the EAJA application, because it was a *Karnas* remand. My point is, as Mr. Garvin said earlier, if we have a case that's a *Karnas* remand but you think there are independent grounds for remand, to preserve your EAJA application, you need to raise them. We need to discuss them, and those issues need to be resolved in the joint motion. In other words, instead of you looking out for your attorney fees and us looking out for the disposition of benefits to veterans, together, we're going to have to reach an agreement that disposes of the mutual benefit; but the Court's not going help.

MR. GARVIN: Mr. Carpenter?

MR. CARPENTER: Kenneth Carpenter from Topeka, Kansas. I think you made an unfortunate selection of words, Adam, when you suggested that you were interested in the veteran, and by implication, attorneys were interested in their fees.

MR. LLEWELLYN: I was just framing the issue. I didn't --

MR. CARPENTER: And Judge Kramer did exactly the same thing from the bench in the *Cullens* --

MR. LLEWELLYN: I was merely trying to phrase the issue clearly, frame it.

MR. CARPENTER: No. I don't think that phrases the issue clearly. To the contrary, I think it muddies the water, because it insults us first and then asks us to talk. Now, when you, by implication, suggest that I'm not interested in my client's interest, but I'm interested in my attorney fees, then you started the negotiations off on the wrong foot. And this discussion is on the wrong foot because we're not talking about the nature of EAJA. The nature of the Equal Access to Justice Act is to protect those citizens who have to go to court because they were harmed by governmental action. The right to EAJA is based upon the Government's action at both the administrative level and at the litigatory level. And regardless of the position taken in *Cullens* by the Government, the case law clearly states that it is both the administrative position and the litigatory position.

And what was being discussed earlier is in essence what the Supreme Court talked about in *Gene v. the United States*. And Judge Kramer, in his dissent, in the original *Cullens* decision, incorrectly characterized the discussion of substantial justification as a second front of litigation. The first front of litigation in EAJA is your burden to demonstrate that the Government's position in taking the action which caused the veteran to have to go to court in the first place is or is not substantially justified.

And we want to talk about all of those issues, but we are consistently told, even in prebriefing conferences when we discuss the issues, well, you can raise these issues below. This is a *Karnas*-controlled remand, and you're only worrying about your attorney fee. And I'm insulted then, and I was insulted in open court by the soon-to-be Chief Judge Kramer's insinuation that this is about veterans versus attorneys. We are the attorneys for the veterans, and we want what's in the best interest of our clients, and as Mark and Cindy have suggested, it's not in the best interest of our clients to litigate these issues.

But as Bart has correctly pointed out, you put us between a rock and a hard place, and so does the court's decision in *Dillon* because it forces us to litigate. We don't want to litigate. We want to settle, and we want our clients to be compensated for having been forced to go to court when they didn't need to go to court. And I would just like to just mention one more correction about what Ron said about the record in *Cullens* -- or excuse me -- the basis for the decision in *Cullens* -- or maybe it was Adam. I'm sorry. I don't remember which one.

But in *Cullens* there was a Board decision that ignored an express exception, a good faith exception for the nontimely filing for benefits. And that exception in the existing regulation was ignored, and this is a perfect example of what we're talking about in this context, because, yes, there was a change in regulation, and there was a change in regulation that clearly mandated a settlement. But had Mr. Cullens not appealed his case, he was the victim of that case, and he had to come to court to get his settlement, and if he had to come to court, then the Government's got to pay the freight.

MR. GARVIN: First of all, let me clarify that we -- by "we," Government attorneys recognize that we're both there to represent the veterans, and that's the bottom line. That's what this is all about. We talk about judicial review, engaging in an adversarial process; the adversarial process are legal arguments over the application under the law, not on what's best for the veterans. We believe, as do you, that we're taking the veterans' best interest at heart, overall, and for that, if we imposed the wrong impression on you, please, as Adam indicated, correct us -- as we may be! And just to add some fuel to that, perhaps, one of the strongest advocates for recruiting additional practitioners into veterans law is myself. I'm out there every day trying to get new people to join NOVA so that you guys can teach them how to do it right.

MR. CARPENTER: I have one for you.

MR. GARVIN: Did I answer it?

MS. CORSE: My name is Stephanie Corse, and I have a question about something that you said and Adam said, and that is, part of the reason you litigate the reasonableness of the fees is because

you don't have direction from the court as to what is a reasonable expenditure of time by attorneys.

MR. GARVIN: Yes, that's correct.

MS. CORSE: Are you looking for the court to say 40 hours is sufficient to write a brief, ten hours is sufficient for designation of record, and that's what you're looking to get from the court so that you don't have to litigate the reasonableness? Because I don't think you'll ever get that from the court.

MR. GARVIN: The court has steadfastly avoided specific guidelines that will help both the private bar and counsel for the Government. And I'm going to -- this is personal, but I'm just going to give you an idea of what goes on there. A lot of my law training comes from the hills of Pennsylvania where I was raised, and comes from my father. He used to say, if it makes good sense, it's probably good law. With the attorneys for the Government to set the tone of when we're going to start talking about attorney fees under the EAJA, the first thing we may look at is, four hours or ten hours or a hundred hours, whatever it is, of discussing the case with the client to determine whether you're going to take it.

Well, is there something reasonable there? When is that reasonable? Because I look at the TV every night, and Attorney Greenberg says, if you've got a telephone, you've got a lawyer. Give me a call, and we'll assess your case and determine whether or not you should go forward. No charge to you, but yet, when we get the EAJA fees, the first thing that happens is the Government is being charged for that initial assessment. The other initial assessment is, I review the pro bono consortium memorandum. Well, that's an assessment of the case, to determine whether they have an issue to go forward in the litigation. Again, is that to be paid or not? I'm not saying one way or another.

I'm saying the court won't tell us if that's reasonable. So far as, is it reasonable for $10,000 or $40,000? The Government really doesn't care. But if the court came out and said, every EAJA case with a single issue is worth $10,000 easy. Single issue, $10,000, we pay you. And one with two issues is $15,000, and so on and so forth. That's easy. We can apply that, but what happens, or where we are at the current time, is -- the court won't tell us what's reasonable. They won't give us a road map that these issues are worth this much in the assessment and these other issues are worth something different. I think Bart and I agree. It's the court's avoidance of their responsibility to get specific in their guidance. Bart does not agree, but I'm stating that the court will not give us definitive guidelines which we can apply on a case-by-case basis so that we avoid these disagreements with counsel for other side.

MS. CORSE: But do you think that any court -- I mean, looking at EAJA litigation across the country, to get this sort of specific guidance from a court. Courts look at cases on a case-by-case basis, and there's all different variable factors. I just don't see how you're going to get what you're looking for from *Copeland*. I don't really think it's fair to criticize *Copeland* as if they're doing something different from all of the other courts in the country.

MR. GARVIN: But they are. Because EAJA first applied to this court, nobody stopped to think about the basic premise of EAJA. In all other courts, so far as I'm aware, there's a fact-finding court. It has those facts on which they make a determination as to whether the effort put into the case is

reasonable.

Here, and I can bring you mem dec after mem dec where this Court says the Government can't prove substantial justification. How is the Government going to prove anything where we have no opportunity to present evidence? At the same time, this same court over and over again will say the applicant's application for fees is the evidence upon which we're basing this fee. So we can have evidence only from one side. And that gets us excited, quite frankly.

When they impose or they said EAJA fees are obtainable for practice before this court, and I argued this in *Chesser* perhaps they should have created a mechanism where we could have some fact finding like they do in the other courts. Then this Court of Appeals would rule on these things.

There's a question way in the back.

MR. FARBER: Hi, Mr. Garvin. Shelly Farber from Pennsylvania. I have wisdom from my father who is a lawyer with me in Pennsylvania. We're on Veterans Square, incidentally, and he went to law school on the G.I. Bill, and he always tells me if we represent the claimant in the case, in an adverse situation, which is what there is before the court, then the attorneys definitely are the ones who are compelled to have the veteran's interest at heart; and that includes the EAJA process. And what I'm concerned about is, you have no objection to a joint remand where all the issues are ironed out for the joint remand. You have no objection to the veteran's attorney preparing the joint motion for remand, rather than letting it sit for a while here?

MR. GARVIN: We encourage that. If we could get the appellant's attorney to draft the joint motion and relieve us of that administrative responsibility, we'd all applaud it. But you've got to remember, as when we draft it, you're going to respond to it, or we're going to negotiate it with the private bar. If the private bar drafts it, we're also going to look at the language from the Government's perspective. But, yeah, we'd love to have people submit a proposed joint motion.

Yes, sir. Would you identify yourself?

MR. HAYDEN: Don Hayden. Would you consider doing --

AUDIENCE PARTICIPANT: Don, could you stand up? We can't hear you.

MR. GARVIN: The question is: Have we considered doing this by a manual or regulation or something of that nature?

Yes, we have considered it. Have we done anything about it? Quite honestly, no. Because at this point, I don't think we have enough empirical data to go to the legislators and say something needs to be done.

On the other hand, are we urging the Court to do something? Yes, right here, right now, I'm urging the Court to do something.

MR. CARPENTER: Well, the problem is you lost *Chesser*. You've lost every single case in

which you tried to get the Court to do this. I don't know why you keep knocking at the door. They've said "no." They've said they're going to do it on a case-by-case basis, and they're going to impose the burden on the Government. Whether you think it's unfair or not, you're going to have to demonstrate an excessiveness in the fee or a lack of substantial justification.

Now, how is it that you justify continuing to come back and maybe not going up to the Federal Circuit to argue about this? You've lost every time on this issue at the CAVC.

MR. GARVIN: Quite frankly, the Federal Circuit, I don't think, would take the appeal. It's an application of the facts to the law, and they're not going to listen to it.

We've looked at it, and why do we keep bringing it back and keep trying it for more definition? For the same reason that the private bar keeps taking appeals to the Federal Circuit: To get definition and clarity. And when you think something's wrong, you keep after it until it gets a meaning where everybody can accept it. Cindy?

AUDIENCE PARTICIPANT: I'd just like to say I think it's incumbent on the private bar to submit EAJA applications that are reasonable, because we don't want to push this envelope and give the General Counsel the opportunity to create bad law with bad facts. And if you keep the EAJA application reasonable, we're not going to do that.

MR. GARVIN: You're absolutely right. Wwe couldn't agree with you more. As a matter of fact, Julie and I, when we were talking about what I think came as kind of a surprise -- and correct me if I am wrong, Julie -- we think, looking at my statistics for this year, we'll have somewhere in the neighborhood of 900 applications for EAJA fees. We'll pay out over $3 million in those fees. Of those 900 applications, we probably only contest between 30 and 50. So, I think that's a pretty good testimonial to the fact we do look at them, and if they're in the ballpark, they go. And it's only specific issues in some cases. We may contest a $4,000 case because there's a good issue there that we want the court to speak on. Unfortunately, they keep ducking it, and they won't give us an answer, but we'll continue to keep after them to give us a road map if they will. Bart?

MR. STICHMAN: I want to agree with part of what you're saying about how fees are litigated in other courts. It is true, especially in U.S. District courts, where there's discovery power, that the Government sometimes conducts discovery in order to get the facts which will enable them potentially to argue that the fees were unreasonable. But I don't think it's fair to say that this Court has prevented you from doing the exact same things your brethren do in other courts. And that is if you have questions about the fee application and want to elicit facts that are going to help your side, why don't you do it? The Court has never said you can't. I've had your office write or call me and ask about details of the fee applications. Reasonable requests should be answered. The Court's not stopping you, so why complain about the Court?

MR. GARVIN: The difference between negotiations, which are not part of the record and can't be discussed anyplace else and developing a record for the court to consider are, I think, at wide variance there. In one case, and I don't know who was involved on the other side of that, in *Chesser*, we tried that. We tried to present to the court, as evidence, analysis of some 60 cases for a like period of time, and what we thought were similar cases. The Court said, don't give us that stuff. We

can't consider it because every case is individual, and we don't want to hear a list of --

MR. STICHMAN: That's not what they said. They accepted your cases and said they didn't think this case -- they gave a variety of reasons why you didn't win based on that evidence. But to say they didn't accept the evidence. Did they strike the evidence from the record? Didn't they discuss it in their opinion?

MR. GARVIN: They said it was worthless, essentially.

MR. WYMES: I was the attorney on the *Chesser* case, and what the court actually said is that you gave absolutely no statistical probability, no reason for the court to believe that that set of cases on the 414-page brief that you dropped on me had any validity and any bearing on Chesser's case.

MR. GARVIN: Thank you, Mr. Wymes. I rest my case.

MR. CARPENTER: Yes, you did.

MS. COOK : My name is Barbara Cook from Cincinnati, and I just wanted to -- getting slightly off of this, but responding, Ron, to your comment about wanting to settle the cases and the reasonableness of the fees, one of the frustrations I have had periodically, and I've heard other private attorneys express is, when there's a discussion about the amount of fee, is some GCs will call and say, well, we want you to knock your fee off by 2,000 or "X" thousand dollars without really analyzing it, and I will tell you that I personally do not ever agree on that basis alone. If the GC has concerns about something in my fee petition, I want to know with specificity what it is, and let's talk about that. If they are genuinely concerned about, you know, this is an excessive amount of time or an inappropriate entry or something, then I think there's a basis for discussing it, but just to come up with numbers which sound like they are out of thin air, is not helpful. So I'm just passing that along.

MR. GARVIN: I appreciate that, because if there are negotiations, they should be based upon what we perceive to be a weakness in the application. And the areas that we normally would target are the amounts of time spent on a record review. And we're looking at -- and I'm throwing these out just for your consideration -- we may have a one-volume claims file, 150-page record, and we have 30 or 40 hours of records review on the EAJA application, we're going to ask about that, because we think it's unreasonable.

In those cases where it's a single-issue case, and we look at 60 hours to research and brief, it's quite difficult for us to find, in our own minds, how that 60 hours for a single issue, unless it's one of first impression, is reasonable under the circumstances. And when we look at them, also, one of the things that, not so much my attorneys individually, but when it gets to my desk, one of the things I'm going to look at is: Was all the effort involved or invested in the case productive effort? Because the case law says that all hours imposed are not necessarily hours reasonably billed. You can have redundant, nonproductive, and ineffective research go into the project, too. We'd like to, in exercising billing judgment, identify those things and come to a reasonable accommodation.

MS. SMITH: Cindy Smith from California. One issue that's come up repeatedly for me in my

fee applications, and you probably recognize the issue, I'm a solo practitioner, and, sometimes, as part of my research, I consult with other attorneys who are experienced in the area of veterans law in order to bounce my ideas off them and see if I have a valid theory or what they think. And rather than just collapsing that into a generic category, I straightforwardly say on my EAJA application and my time records that I've attached, that is, this is time that I spent consulting with John Doe, attorney at law. And that has been questioned on several occasions, sometimes not, but sometimes it is. So it's rather inconsistent, and I was wondering if perhaps you might have arrived at some sort of definitive position with regard to that, particularly in the case of solo practitioners.

MR. GARVIN: I'm not sure about that one, Cindy, and I don't know whether we've specifically challenged that or not. What we do challenge, and I do this consistently, and it goes back to that good law that I learned up in the woods of Pennsylvania, is, when we get billed not only for your time, but also for the person you were consulting with. We look at that as: When I enter into an agreement for $150 an hour, I don't mind paying $150 an hour, but when I get your $150 and Joe's $120 and Susie's $85 and somebody else's $75, you say wait a minute. I contracted for $150 an hour, not $780 an hour. So we question those. If we're questioning yours, I don't know offhand what the specific basis is.

There are cases, quite frankly, where we may question, and I think legitimately, whether it's -- it shouldn't be in your case -- somebody who is inexperienced in learning the law. The Government should not be paying for teaching people the basics of veterans law. And we do question them. Maybe somebody didn't recognize you and questioned you for that. I don't know.

Yes, sir.

MR. HAYDEN: Don Hayden again. You said that it should all be productive time. Sometimes you have research that doesn't pan out. Are you saying that should not be included?

MR. GARVIN: No. To exclude a theory of the case is productive time. And if I imposed that impression, please correct it. You have to research both those positive issues on which you can prevail, and you also have to eliminate issues that are not winners. That's standard practice of law, and I don't mean to impose any other impression.

This is your time, folks.

MR. SCARSIS: Sir, I'm Paul Scarsis. I'm a law student at William Mitchell, and forgive my naivete, but do attorneys ever bill on a blended rate in your office?

MR. GARVIN: On a what rate?

MR. SCARSIS: Like a blended rate. Maybe a partner will charge $185, but an associate gets $125, and a paralegal gets $60, and then they bill you on a blended rate of $145.

MR. GARVIN: No. The EAJA's pretty specific. It's set at $125 per hour for attorneys, and that may be adjusted by the CPI index. And we're also paying, I think, the standard rate is $85 per hour for paralegal work. Yes?

MS. COOK : Barbara Cook. We're both from Ohio, but other than that --. At the very beginning, to get back to your first comment, you were talking about the proposed regulation which is going to be put on the Secretary's desk, and you're disavowing any knowledge of whether it will be signed or not, but on the assumption that it is going to be signed, which would no longer call for withholdings of attorneys' fees, do you have any concerns at all about that reducing private attorney involvement? I mean, everyone -- we heard Judge Nebeker this morning, and certainly, I've heard other members of the Court, and certainly people from the clerk's office, describe that it is helpful to have attorneys involved.

MR. GARVIN: Do I think that the passage of the regulation which would take the VA out of withholding would impact the number of practitioners? No, I do not. For two reasons: Number one, attorneys, I think, are very wise and savvy individuals, and they'll figure out a way to receive their compensation from their clients without using the Government as a collection agency. Number two, as soon as that regulation is signed off, I bet you guys are going to beat a fast path up to the Congressional Hill, and --

MR. CARPENTER: No, sir. It's the Federal Circuit.

MR. GARVIN: You'll be running in two directions, to the Federal Circuit and the legislative branch for changes.

MR. CARPENTER: Just while we're on the subject, I really think that, should the Secretary exercise the poor judgment to sign off on such a regulation, it's done so with a blatant disregard for the plain language of the statute. There is one portion of the statute that says "may." There are two portions of the statute that say "will," and the obligation is clear and the Secretary interpreted the regulation to be mandatory and, now, with no empirical evidence whatsoever, you're going to do a 360 in order to drive the private practitioners out of business. And with all due respect to what you've just said, it's a load of horse manure. There is no way that the private bar is going to be able to survive if there's not withholding of attorney fees. And let's just get the agenda right out on the table. There is no reason not to withhold our attorney fees. Social Security withholds attorney fees. This agency has withheld attorney fees on occasion for the last ten years. There is no reason not to withhold attorney fees except to get us out of this business, and you will succeed in doing that.

MR. GARVIN: That was a comment, by the way. Yes, sir?

AUDIENCE PARTICIPANT: Yes. I suppose you could consider this either a comment or a question.

MR. GARVIN: Please identify yourself for the court reporter.

MR. FRISHBERG: I practice in both the field of social security law and veterans law, and as with veterans' benefits, social security checks and supplemental social security income checks are not subject to being collected by a taxman. Also, as with veterans' benefits checks, they usually go with people who don't have any other source of income.

Now, the private bar practicing in veterans law is no smarter than the private bar practicing in social security law. In social security law where there is empirical evidence, you can check with the National Organization of Social Security claims representative. You'll find most of the attorneys in private practice who take social security disability cases where fees are withheld, most of the people are not taking SSI cases, and if they are taking SSI cases, they're taking them despite the fact that frequently our clients, because they get a big check, have a lot of back bills and at the bottom of the list of things they want to do is pay their attorneys off. That check doesn't get paid to the attorneys. And many attorneys have simply decided they can't afford to take additional cases in areas of SSI and will only take those cases with SSD when they're ensured that at the end of the process, it may involve laying out money their clients don't have for medical records, experts, as well as time. If they're not going to get paid, they can't take the case to begin with. So I don't understand how the VA believes that it is going to succeed with attorneys remaining in the area of law only paying private attorneys because a veteran's check has something withheld from it when the VA doesn't make an error and send it on.

MR. GARVIN: Thank you.

MS. SMITH: I think that such regulations would definitely have a significant adverse impact on individuals such as myself who have a nationwide practice. I know a lot of attorneys who represent veterans who tend to confine themselves to the particular states they're in. And, perhaps, if they were not to be paid by their clients, in the absence of VA withholdings, they might have some sort of state record in order to pursue those fees. However, I would not be in that situation. I won't be able to afford if they institute any sort of state action from any of those states, albeit, other than California perhaps, to collect my fee. But the elimination of the withholding by the VA would adversely impact my ability to continue to be able to afford to provide representation to the veterans at the board and the regional offices.

MR. GARVIN: Thank you. We're getting close here. We're going to take two more questions.

MS. SMITH: I just want to know, what is the Government's reasoning for not withholding?

MR. GARVIN: What is our reason for not wanting to withhold?

MS. SMITH: Yes. Why this change in position? What is the basis?

MR. GARVIN: I'm not sure that I can answer that, Cindy. And if I answered it, it would only be as Ron Garvin answering it, because I don't have any of the Agency position on that. But if I were going to answer as Ron Garvin, I would probably say that it's because the agency has fouled up too many times, and we find ourselves litigating over double payments. We want to get out of that litigation.

Last question, sir.

MR. RAMSEY: I'm Brian Ramsey from Ohio. It seems to me that to some regard, the idea of how many hours it takes to review a case is arbitrary, because every case that I've done EAJAs on so far, my hours have been questioned. One of them, I spent about 40 hours reviewing the record

because there was more than a thousand pages in the designation of the record. The veteran, before I even got to the designation of the record, had brought in over 500 cases, and -- pardon me -- I mean two cases together. There was an entire case of paper. There were ten reams with the designation of the record, and then I got another ten reams once they gave me the records that had the page numbers on them.

MR. GARVIN: Brian, if I may, I don't mean to cut in, but I would suggest that, if your application indicated that you reviewed 9,000 pages of record, it probably would not have been questioned.

MR. RAMSEY: I wrote down, on this date I read Pages 1 through 250 and on this date I spent so many hours doing it. There were detailed pages that I read. I spent hours reading these pages, and I put down the dates when it was done. I've got to keep up with everything, go to traffic court, social security work, and everywhere else in between. Usually, when I get one of these objections to my fees, one, I've only handled -- I've got 20 veterans cases in my office, and so, as a solo practitioner, I feel more or less intimidated by the Government because I don't have the time, energy, and the money to spend defending my fee.

MR. GARVIN: One of my attorneys wants to address that. Jim Calis?

MR. CALIS: Jim Calis. I'm an attorney with Group VII. I would basically submit to you that review of the records and engaging in that type of action is not arbitrary. A small claims file is a small claims file. When we question you, it's because we've done it ourselves, and if you're telling me it took you 40 hours to review a thousand-page record, and I know it took me eight hours, there's something amiss. I'm good, but not that good.

MS. CLIFFORD: Sometimes what we're looking at is not the same as what you're looking at.

MR. CALIS: We're looking at exactly the same copy you're looking at.

MS. CLIFFORD: You aren't looking at the original claim file.

MR. CALIS: After the record has been developed, we're looking at the same copy you're looking at, and the same copies are also submitted to the court.

MR. GARVIN: We work out of the designation of record, which is the second or third reproduction of the S-file.

AUDIENCE PARTICIPANT: I respectfully disagree with your statement. I don't know what you do when you say you review the record, but --

MR. GARVIN: Excuse me. We need to cut it off here. They want us in by noon. Thank you for your interest and participation.

SECOND PLENARY SESSION

JUDGE GREENE: Continue your lunch as you can without too much disturbance; I'm sure you'll be interested to hear what our next speaker has to say.

Before I call upon Judge Holdaway to introduce him, however, there are two other people I want to have recognized. They are individuals who are indispensable to the Court, not only just for this conference, but for each and every day that we come to work.

There are three U.S. Marshals at the Court, and two of them are here today, and I would like to recognize Hewitt Brantley and Marvin Jacobs, and have them stand up for a round of applause.

(Applause.)

JUDGE GREENE: I now present to you my dear colleague, Judge Ron Holdaway.

JUDGE HOLDAWAY: Well, it's my pleasure today to introduce the guest speaker for this luncheon. The Honorable Joseph Thompson is the Undersecretary for Benefits in the Department of Veterans Affairs.

He was confirmed by the Senate in 1997, following his nomination by President Clinton. He's done about everything you can do in the area of veterans' benefits.

He's currently, of course, the Undersecretary for Benefits, which is the top spot. He started his career as a claims examiner in the New York regional office, transferred to Washington, subsequently became a management officer with Eastern Region Field Office -- Field Director's Office, was Assistant Director at the Philadelphia Regional Office, and was Director of the New York Regional Office -- the VA regional office in New York City.

He is a native New Yorker. He has a Bachelor's Degree from Pace University and a Master's Degree from George Mason University. And just to show nobody's perfect, he's a veteran of the Air Force.

But I will now -- I see John Howell applauding out there. I will now, without anything further, introduce Joseph Thompson.

(Applause.)

UNDER SECRETARY THOMPSON: Thank you, Judge Holdaway. It's a pleasure to be here with you. I really appreciate the invitation and the opportunity to speak to you all today.

I have some good news and some bad news. The bad news is that I'm a little bit of a nut about the history of veterans' programs, and I use every opportunity to talk about them. And I typically start with the old Kingdom in Egypt 3000 B.C.

The good news part of this story is, I think, in the interest of time, I'll probably cut about 4800 years out of that story and try to get up closer to the modern era.

I do want to talk about benefits, and if I could, I want to tell you a little bit about the C&P program and how it evolved, and about some of the law that evolved with it. I'm prefacing all of this by saying I'm neither an attorney nor a historian. And so that gives me a little leeway to make some mistakes in my presentation, if you don't mind.

There is one thing I want to mention in ancient history, at least in terms of veterans' benefits. The Roman Empire had an extraordinary array of programs, many of which we would think are modern era types of things: compensation, pensions, survivors' benefits, headstones, civil service preference. They gave away land.

But they had one thing that we don't do today, and if there are any members here from legislative branch of government, I'd like you to consider this. They exempted veterans from taxes. As a veteran, I think that's a program that's long overdue.

(Applause.)

UNDER SECRETARY THOMPSON: Thank you. If I could, I would like to talk a little bit about the American experience. You know, our law, of course, flowed from British common law, and specifically, from an act for the relief of soldiers. Great Britain passed it in the latter part of the 16th century. When the colonists came here from Great Britain, they really had that thought in mind. And the government does have an obligation to take care of veterans who get hurt while serving their colony or their country.

Most British North American colonies just thought it was prudent public policy to help veterans. Each colony had its own rules. Some of them -- in fact most of them -- used courts to make decisions on veterans' claims. Others left it to the local governments. The thing that brought it all together, of course, was the Revolutionary War.

Two hundred and twenty-four years ago last month, the Continental Congress passed a resolution that said any soldier who was disabled or who lost a limb would get half pay. If he got killed in the service, his family would receive the benefits. Two years after that, they passed a service pension at George Washington's request because he needed people to stay in the military. You had to promise them something, particularly officers. So they promised a service pension.

Now, under the Articles of Confederation, after the Revolutionary War, the states actually paid the claims and were to be reimbursed by the Continental Congress. Things were widely variant depending on which state you went to, and what you saw were some very, very unhappy veterans. And one of the groups that pressed most strongly for the creation of the central federal government and most strongly for the ratification of the Constitution were veterans. They pushed hard, and obviously, it turned out their way.

Now, in our new government we had three branches. The roles were not necessarily clearly defined. So I'll give you the claims process circa 1792. If you were a veteran with a service-connected disability, you went to Circuit Court, having already secured your own certificate from your previous commanding officer as to your disabilities.

You had to get it on your own. There was no duty to assist back then. It was all on you.

If the Circuit Court found in your favor, it then went to the Secretary of War, who could reverse the Court's decision. If the Secretary of War reversed the court's decision, it went to the Congress, who could reverse the Secretary of War's decision, a very unwieldy process, as described, an administrative nightmare. The Courts were not happy with either the volume of the claims or the burden that the Congress had laid upon them.

In 1793, they tried to tinker with that system. They said, We'll taike the responsibility from the Circuit Courts and give it to the District Courts.

These Circuit Courts actually were empowered to appoint three-member panels to review the claims for them. Those three-member panels are the forerunners of our rating boards and regional offices today. So our rating boards are at least 207 years old. We've changed one or two processes, but it's been pretty much the same for the last 200 years.

They limited the powers of the Secretary of War to reverse decisions. Congress became the final arbiter in claims. That still didn't square well in many quarters, and ultimately, the following year, they gave the power to make the initial decisions on claims to the executive branch, where it remains.

Now, pensions aren't just some dry discussion, particularly pensions in the Revolutionary War. There are three things you want to think about in terms of veterans' pensions coming out of the Revolutionary War.

One is that it was the start of the government's acknowledgement of its obligation to, at times, help individual citizens. It did not do that very easily. It did it for veterans. It took more than a century to do it for any other citizens. It took until the 20th century for any other citizens to come in under Workman's Compensation or Social Security or anything else like that.

It also became the basis for all future cohorts and veterans to point to to say, "You did it back then. You need to do it for us, as well."

And probably most important -- not probably most important -- most importantly, absent veterans' pensions, we would have lost the Revolutionary War. George Washington -- General George Washington simply would have been unable to either get an army started or to keep people enlisted through the duration. The pensions are given the credit for doing that.

Pensions have, in fact, been a part of every wartime era in U.S. history. The Civil War, as with so many things that the Civil War is responsible for, really began to dramatically change what was taking place in veterans' pensions.

Now, a host of programs came out in the Civil War. The National Homes signed into law by President Lincoln obviously was the start of the VA health-care system. We began to service connect disease, which actually accounted for two-thirds of all the casualties in the Civil War. We started paying disability payments based on the percent of disability versus the rank you had attained

in service. That was a major shift.

And, of course, they had these unscrupulous characters called "claims agents" floating around after the Civil War, who were representing the veterans before the government, and oftentimes, ending up with most of the veterans' disability payments.

I don't know what the modern term is for claims agents. Some of you might know what that is.

(Laughter.)

UNDER SECRETARY THOMPSON: The direct response to that, of course, was to limit the amount of fees these agents could collect to $5. And then, a year or two later, they thought that wasn't enough and raised it to $10, and adjusting for inflation, kept it that way for another 120 years or so.

Probably one of the most significant things that came out of the Civil War, though, is that the responsibility for making public policy moved back from the Executive Branch to the Congress, and there were some important reasons for that. But the Congress became swamped with requests for private pension bills for individual veterans who couldn't otherwise qualify for a pension.

Now, I need to clarify the term "pension." Up until the 20th century, any money we paid was a pension. If it was for getting hurt in the service, they called it a "disability pension." If it was for other reasons, for enlisting or re-enlisting or whatever it may be, it was called a "service pension."

Nonetheless, they had these private bills, tens of thousands of them, being considered at any given time.

The courts' role was restricted to interpreting whether the law was followed or not in the individual claim decisions. Congress considered giving more of a role to the courts. They did not do so, and there were some reasons they didn't do that. The courts weren't particularly interested in it. Congress didn't want to lose the influence it had over veterans' issues.

Now, I can tell you that neither the legislative nor the executive branch of government, the federal government, covered itself in glory after the Civil War in terms of veterans' programs. For Congress, oftentimes veterans' issues were simply a vote-getting ploy.

There were very few citizens in this country whose lives were not touched directly by the Civil War. So it became very much in Congress' interest to maintain control of the program, even if it wasn't necessarily in the veterans' interest.

The Bureau of Pensions, which was the executive branch agency that was created to pay pensions, was one of the most corrupt organizations in government. As described in the literature of this time, it was a virtual Republican machine.

They would actually go, and if there was a close election in a particular state, they would concentrate on doing claims for that state. If the veteran came into the Bureau of Pensions, they

would oftentimes be told how to vote in the next election.

By 1900, a lot of the dust had settled, for good reasons. The government reforms that had begun with the Pendleton Act and the creation of the civil service system, a professional civil service system, and thrown out the spoils system, had pretty much worked its way through the Bureau of Pensions. So you had professional administrators instead of political hacks and cronies running the programs.

By that time, 35 years later, most Civil War claims had been adjudicated,. Some of the laws were incredibly generous. In fact, the Pension Act of 1890 granted virtually any veteran or survivor a pension.

Let me give you a little example, some statistics from the time. From 1889 to 1892, the number of people receiving pensions doubled from a little under a half a million to a little under a million. Thirty-four percent of the entire federal budget of 1890 went to veterans' pensions. That would translate to what now, a trillion dollars? We might be able to get through the fiscal year with that kind of money.

Things remained relatively quiet until World War I, but something was taking place in American society at that time.

The name, "veteran" -- the term, "veterans' pensions," had taken a very, very negative turn in America -- had a negative light on it, I should say. By 1912 or so, about 96 percent of all living Civil War veterans were receiving a pension at a time when no one else in America got a pension from the federal government.

As the war broke out in Europe in 1914, before we became involved, legislation passed, called the "War Rescue Insurance Act." A couple of things happened in that act that I think illustrate the feelings about what we call "pension" back then, what we call "compensation," today.

It created our insurance program, originally designed to insure the ships, and later, the crew. And then, when we got involved in World War I, we started insuring service members because no one else would provide life insurance.

The first iteration of the VA's life insurance program was not life insurance. It was disability and life insurance. It was, in fact, designed to replace compensation. The veterans would pay in, getting insurance. If they got hurt, insurance would take care of their financial needs.

Obviously, that didn't last, but it gives you an idea of what the thinking was back then.

The term, "compensation," came out of the same act, named after what was a fairly new program, the Workmen's Compensation Program. But, in large measure, it was changed just so we wouldn't call it a "pension" any longer.

Our first rating schedule of disabilities came out of that same act, and our vocational rehabilitation program also flowed from the War Risk Insurance Act.

In the early '20s, they started consolidating veterans' programs, the Bureau of War Risk insurance, vocational rehabilitation, some public health service things created the Veterans Bureau.

We added presumptive conditions. We had not had such a thing before then. It said that if any veteran who showed signs of tuberculosis or psychiatric disorders within a year of discharge, we will presume the origins of that disability were in service.

By the mid-'20s, Congress was pretty much separating itself from the claims process. They had begun that earlier in the century, but now they were really getting out of the business big time.

They gave final authority to the Veterans Bureau for findings of fact or for a veteran to prevail in his claim if it was denied. He had to show violation of Constitutional rights if the decision was arbitrary and capricious. Rarely an effective tactic, it usually didn't work.

It was 1930, of course, that Veterans Bureau and the National Homes and the Bureau of Pensions became the Veterans' Administration. The '30s and the depression had profound changes in store for veterans' programs.

You know the bonus Army was here in 1932. It was routed by the U.S. Army, led by George Patton, Jr. Veterans were seen as having been abused by their nation as a result of that.

Nonetheless, within a year of that event, President Roosevelt and the Congress, through the Economy Acts, began fairly draconian reviews of what was taking place in veterans' programs, with the intention of cutting the benefits very specifically. They created special Boards of Review, and these special Boards of Review, by definition, did not include VA employees. They opened 128 Boards, and they had them look at every presumptive, service-connected evaluation. Within six months, they had knocked 67 percent of war veterans who had been receiving benefits off the rolls.

Congress had second thoughts and went home on recess. Met with some constituents wearing service caps. Thought better of the idea, and put things back the way they were. FDR vetoed it, and they overrode the veto.

One of the other small sidelines coming out of that same piece of legislation, of course, Judge Clark, sitting here, creation of the Board of Veterans' Appeals. When they first decided to strip some of the veterans of their presumptive disabilities, they did create BVA to review those decisions.

Things stayed pretty much the same until after World War II. In response to World War II we created what was probably the best piece of social legislation in the history of this country; the World War II GI Bill. This was also the beginnings of pressure for judicial review of veterans' claims.

As the Vietnam cohort was coming back, Vietnam veterans clearly had a different perception of VA than did earlier cohorts of veterans. I'm not saying that earlier cohorts loved the VA, but compared to Vietnam veterans, of which I'm one, there was no love lost there.

And they felt like they needed someone outside. They needed an entity outside of the Veterans'

Administration to pursue their claims.

The programs themselves have grown a lot. Thirty billion dollars by the late '80s were being paid out in various veterans' programs.

As the discussions about whether VA should become a department level agency or not continued, you had a lot of talk about how important veterans' programs were, and how they affected not just veterans, but all citizens.

You had very contentious issues at play. Environmental hazard issues, radiation claims, dioxin exposure, post-traumatic stress disorder. All of it really kind of fueling the fire, I'll say, for change.

And there was a powerful argument given oftentimes that veterans, in fact, were denied rights given other citizens to pursue their claims in court, and the result, as everybody in this room knows, of course, is that there's a Veterans' Judicial Review Act.

That's enough for history. I'm going to talk about the present, if I may. In the dozen or so years since the Act was passed and the Court got started and began issuing decisions, our world, the Veterans Benefits Administration, has changed dramatically. I've been part of this organization since 1975, and the changes have been extraordinary, really, and accelerated over time.

The top of my list for why that's so is that precedential decisions from the Court significantly changed the way we decide claims in regional offices. I don't know any other way to put it. As I said, I'm not an attorney. I don't make disability evaluations, but I can guarantee you, if you go in any regional office, anybody who was there before and after will tell you the difference is striking.

Changes in the law itself have expanded the compensation program, particularly with presumptive conditions.

We note that veterans are much more likely to file claims today than they used to be, and veterans are filing for more disabilities per claim.

We think some of that is attributable to outreach efforts in the Transition Assistance Program. Veterans who have been discharged, in essence, since the Gulf War era, have a lot more information given to them about what they're entitled to, and I think are considerably more sophisticated than their earlier cohorts.

And, finally, many of the issues that we deal with, and I'll say undiagnosed illness is probably the best example, undiagnosed illness for Persian Gulf veterans are particularly difficult to decide.

I'm going to sum all of this up by giving you a statistic as to how it's impacted BAV.

From 1989 to 1999, the number of decisions made by rating specialists in one year has dropped by 58 percent. So we're doing 42 percent of the volume of claims per person that we were ten years earlier.

Now, the Veterans Compensation Program is a very open-ended process. It's the most complex disability program in the federal government, undoubtedly in the U.S., maybe in the world. I don't know and I don't have that much information.

I want to present some statistics, if I could. This is from when I testified before the Senate in July, and most of what I tell you is contained in our annual report. I'm going to put in a plug for this. If you want to read statistics about how fast we do claims or our rates and things like that, that's not in here. What's in here is a discussion of the benefits programs, and who receives benefits by age, race, gender, military service, and wartime era cohort. All kinds of information. It's not just C&P. It's all the programs we administer, vocational rehabilitation, home loan guarantee and insurance, and education, as well. Only a few things.

Title 38 was a fairly slim volume at one time. It's more than 1,000 pages today. The regs themselves, regulations, run more than 1,000 pages. Our rating schedule has more than 700 disabilities, 112 of which are presumptive conditions. We pay special monthly compensation, to disabled spouses and children of certain veterans.

In addition to service in the Army, Navy, Marines, Air Force, and Coast Guard, there are 64 other ways you can qualify for compensation and pension benefits with the Department of Veterans Affairs.

As I mentioned before, veterans typically file for more than one disability. With new claims, the number, as of fiscal year 1999, was 4.72 disabilities per claim. That number can run into the dozens. It can run into the hundreds. I have one in my drawer with 372 claimed issues in there that I keep as an exemplar of something, I'm not sure what.

Claims, as you know, because you're in the business, can span decades. They can include thousands of documents.

In most cases, we do need to go someplace else to get evidence and information: the National Personnel Records Center, the Center for Unit Record Research, the DOD (our own sister agency), and the Health Care Administration.

Where we go is one of the major, maybe *the* major driver, of how long it takes to do our job. If we are running our pre-separation program, where our folks are actually at the separation centers and taking claims, it's about 26 days.

If we get a claim from a veteran with post-traumatic stress disorder who doesn't have a stressor in his or her record, then we need to go to the Center for Unit Records Research to find out what his or her unit was doing on the day he said he was stressed. That can take a year. Most things fall somewhere in between.

When we hired a contractor a few years ago to look at the adjudication process in VA, they started flow charting the process, it ran to 400 pages of flow charts.

And when we did a checklist on teaching people how to avoid mistakes in ratings, we got to one

rating that had 120 areas where you could make a mistake on the individual rating.

As I mentioned, veterans do tend to file more claims today than they used to. I think probably the best indicator of that is that the average number of service-connected disabilities for a Gulf War veteran who's on the rolls, versus a World War II veteran who's on the rolls, is 80 percent higher for the Gulf War veteran. They have 80 percent more service-connected disabilities.

I won't kill you with statistics. Just a couple of other things, if I could.

The veteran population has been in decline since 1979. We went from 28.6 to 24.6 million veterans. During that same period, the number of total disabilities that we are compensating people for have risen from 3.9 million to 5.7 million disabilities.

The number of veterans -- let me mention one thing about that statistic. Why is that important? Because three-fourths of all of our claims are not original. They are reopened claims or inquiries.

That number, that 5.7 million, is the basis for our future. It isn't a veteran population as much as it is the number of disabilities we've already decided are on the rolls.

The total number of veterans receiving disability benefits today is the highest it's ever been in our nation's history. It's higher than it was 20 years ago when the veteran population peaked, and it's higher than at any time, including the Civil War, World War II, and any other point that you want to take a baseline measure of.

If we look at 100 disabilities -- we considered 100 disabilities, on average, 95 percent of them will fall into one of three categories. There will be ten percent disabling, zero percent disabling, or not service-connected at all.

Twenty percent and higher constitutes about five percent, 4.8 or something percent, of the ratings that we actually administer.

Benefit payments in the compensation program, future benefit payments -- "unfunded liability" is the technical term. It's in the annual report there. This is over the next 70 years -- are 1.9 trillion dollars.

In VBA, we're just beginning to adjust this information. I have to tell you that the reason we can give you some of this today is because we've developed some capabilities we didn't have in the past. For any of you who have ever worked in VBA, you realize because of computer limitations and lots of other things, we were really unable to capture a lot of information. We're starting to really compile an enormous amount of information, and we began to look at what the real impacts of those things are.

So where does this leave us? Certainly, when I came to the Under Secretary's job and up to the present, VBA has been criticized for being both too slow and too error prone. It's also been accused of not doing enough to help the veterans who come to us for help.

I think there's a lot of truth in those criticisms. I also believe that they become less true as the days go by.

We're starting to see the impacts (and I'll talk about some traditional administrative measures that we have) of some of the things that were actually begun 18 months to two years ago.

Backlogs. You see all kind of numbers on backlogs, 500,000, a million, things like that. Our backlog, by our definition, is 66,000 claims.

We actually have 316,000 claims. We believe that about 250,000 is a normal inventory for us. That means that we're looking at work as soon as it comes in with 6,000 employees in the claims business. That's about how many we can maintain on a constant flow.

That's gone down from November of '99. Then it was at 144,000. So we've dropped that a lot.

The speed of disability evaluations. Last winter, we were up over 200 days. Right now, it's in the 160's, on average, and we expect to see some pretty significant through this coming fiscal year. We think that's going to go down.

The one thing that has not improved as much as I would like are the error rates. We make a mistake 34 percent of the time in claims. Four percent of those are significant. We usually make an error, either in the rate payable, or as to whether or not the person should be service-connected.

We have some things in play, and I'm hopeful we'll see a fundamental change to that beginning this year, as well.

But because of the enormous changes taking place within veterans' programs, as well as the fundamental restructuring, in my opinion at least, of the organizations of society, we find ourselves in DVA at both a generational and a cultural transition.

Now, we are an organization that's made up of Vietnam era baby boomers. With the math in the federal service, 30 years, age 55. Add 30 years to the Vietnam era, you get some idea of what the demographics are in our organization.

The leadership, most of the skilled positions are held by people that fit that description, and they are leaving. Now, that's a simple fact.

We're beginning -- we've been pushing very hard to try to bring on the best and the brightest of the new crop that replaced that older generation, of which I'm a member, unfortunately. But if you came in to us today, you'd see some things that I think might surprise you in terms of what VBA is doing because we are -- we have the tradition of being -- pretty conservative, kind of locked in the past in many ways, unwilling to change some old habits.

And I want to tell you some things that we're doing, if I could, to give you an idea of where we're headed.

One of the things we've tried to do in the last two and a half years is build a training program. And you would say, "Geez, you know, your organization has got 25 billion dollars in annual responsibility. Certainly you have a training program."

No, we didn't. Training was largely on-the-job. With that kind of approach, obviously, where your job was determined more of what you learned about the world than anything else.

We have worked and put every dollar we had into building training systems. We have expert systems, interactive, collaborative learning systems, in place now or within the next month or so, for all of our disability rating folks. By next year, we'll have it for all of our folks in the decision-making process in comp. and pen.

That's a real key for us. It not only will truncate the amount of time it takes to train, it will try to put some consistency among our decisions, no matter where you go in the United States.

Employee development. Again, we had no strategy for who we were bringing in to work. We are working with OPM and our own personnel folks, developing screening tools to hire people with the skills that we need in this century, for the jobs that we're outlining today.

And my expectation is we've actually begun to use the tool. We haven't gotten formal approval and gone through it in the way that we would like. But that's key, and even more important than that is that we've negotiated an agreement with our unions about employee certification.

Now, in the civil service system, you get promoted and then we hope you can do the job. That's the way it works.

Under this new system, employees to advance must be certified. Their skills must be tested. The test can be a traditional test, or it can be a review of work. But in order to advance, they must demonstrate the skills needed for advancement.

I don't know anyone else who's doing that, but we think it is really going to be a driver of excellent service in the future.

Bob Epley, sitting here, the Director of Comp. and Pen. Service: it's been Bob's mission from day one to improve the quality of the comp. and pen. decisions.

We've put in place the STAR program, which looks systemically at quality, and that was what I was giving you the figures on before.

This year, we're putting in place what we refer to -- the acronym is SIPA, a Systematic Individual Performance Assessment, taking the same philosophy, going down to the individual decision maker.

We'll look at 100 decisions of every decision maker every year, when that program is fully implemented. It will take three fiscal years to get it completely in.

Using technology. Traditionally, technology has been used exclusively to improve administrative

processes. We're looking at it to see if we can improve decision making. Are there expert systems or, in the jargon that's hitting us right now, knowledge couplers, that will allow us to take people and not have them remember 1,000 pages of regulations or 700 disabilities?

Are there IT tools that will make their jobs easier and help them remember a fair number of rules. Not make the decision at the end, but remember what the rules are so that you do get a consistency across the system.

Also, we are partnering with a number of veterans service organizations. There are a number of VSOs in the audience under our TRIP program, and I forget what the acronym stands for. Bob will know.

But we're really asking them to come in and help us, when veterans come to them for help with claims, to secure the evidence, to use our computer systems, when that's appropriate to help them do so.

So we're training them in the use of VA tools and asking them to, in fact, assume some of the responsibilities.

It makes life a lot easier for us, obviously, and, if a complete package comes in with all the evidence secured in it, that also, I think, enhances the VSOs' role, and, best of all, it helps veterans. It helps them get the information to us as quickly as possible.

The Board of Veterans' Appeals has been doing that on remand issues. They have come down considerably over the last couple of years.

Working with our counterparts in health care. I think you'll see some pretty significant changes over the next six to nine months in terms of securing medical evidence from hospitals or VBA requesting medical evidence from hospitals.

We have some things going on. I won't bore you with the details on that. We're going to do a lot better with that.

We're working with the General Counsel's office to rewrite our regulations. We've devoted people to doing nothing but that. I know our regulations are perfect and none of you ever want to see any of them changed, but we have to do some work there, and we're really committing the resources to getting that done.

If you go in the regional office, I can guarantee you that the one thing that probably they're devoting more time to, outside of just doing their work, but in terms of change, the thing they're spending most of their time on is moving from the bureaucratized assembly line, one view of how we do work, to case managing veterans' claims and providing individualized service.

We have never done that in this nation's history. Everything has come into the bureaucracy. The bureaucracy makes the decision. It's up to the veteran to figure out whether or not he agreed with it or even understood it, and to go on and exercise his or her rights from that point on.

We're doing three things that I think are really kind of -- no. They're not really "kind of." I think they are really different.

Number one, we're putting decision makers at separation centers. We want to get these folks the benefits they're entitled to before they separate from the military.

We're in 83 locations today, including 19 of the 20 largest separation centers. We'll be in Europe and Asia before your next conference next year, and the goal is that so much of what breaks down in the system is because of the gap between your military service and when you come to VA for help. We want to close that gap, not just for C&P, but for all the benefit programs. Well, particularly, imagine that if you do have a service-connected disability, you have the decision made when you're released from active duty, then you know what your health care options are. You know whether you want to participate in vocational rehabilitation. Lots of very important life decisions. So we think that's key.

When the claim comes into the regional office, it is assigned a case manager whose responsibility it is to keep the veteran apprised of what's going on.

Now, traditionally, if you call the regional office, you got a phone unit. The person in the phone unit has no idea what's going on in your claim. The only thing that person can do is take the inquiry, go research it, try to find a folder, and get back to you within a few days or a week, or whatever it may be.

Now, you have an individual that you can stay in touch with, and, the way we're developing the phone systems, whom you can call. You will be assigned, in effect, a pin number. You can call any regional office in the United States toll free. Right now, you can call any RO, but the call always goes to the local one.

This way, you can go back -- if you're in Florida and you want to call New York, you can do that. You can get right in. And not only do you have a person that's knowledgeable about what you're doing, they also have the responsibility of making sure you're satisfied with the treatment you're receiving.

And the third step in the process is when you're unhappy with the decision and you want to appeal or you think you might want to appeal, and you don't know what the traditional process involves. Now, with our Decision Review Officer program -- which we're exporting right now and, by next year, we will be done -- you have a person there in the regional office who will sit with you and your representative, explain what has gone on in the claim, if you don't understand, and who has the ability, based on difference of opinion only, to reverse the decision.

We know in the stations, the offices that we tested this in, veteran satisfaction has gone up significantly. The number of appellate actions has gone down significantly.

So we think that by meeting service members before they get out of service; with the case managers and their work when it comes in; and providing veterans, I'll say, a kinder, gentler appellate process, that we can really radically transform how they view what their government has

done for them.

We're VA and I know everyone wants to be VA, but it really is about the federal government. It really is about what society is doing for veterans. So we think that this is going to be a dramatic shift. We will have 44 of 57 regional offices case managing before this year is up.

We're changing everything else in technology.

Phone systems. There was a 15 percent busy signal rate the day I took this job. That number is now two percent.

You can apply online for compensation. Imagine that. And it isn't a picture of a VA Form 526 -- 200526 on a screen. It is interactive. If you've ever done Turbo-Tax, it's like that. It will walk you through. It's an expert system. It will tell you. It will only ask you the questions it needs to know for you to get the benefit you're seeking. It goes right from there, from your computer, to the regional office at your date of claim the minute you hit the key. Then you get a confirmation back.

We're expanding that. We're growing it out. We're doing it for C&P, voc rehab, and we're about to do education pretty soon.

We're also looking at -- and this is the last piece I'll talk to you about -- the decision making process itself. In my belief, it has remained largely unchanged for a long period of time. I mean we still pull paper and put it on somebody's desk, and they sit there and go through it.

There are ways of making that better. By November 1, we expect to announce an initiative on how we're going to look at the process itself -- how people arrive at decisions with the goal of raising the quality and accuracy of decisions that are being made.

So we're going to push that and you'll hear more about that in the fall.

In the VBA, on the fly, we're trying to change what is a very complex organization, while trying to work off some backlogs, among other things.

But I have to say, and I told you in the beginning, I'm a little bit of a student of history of the programs itself. America has easily the broadest, most generous array of veterans' benefits in the world. There isn't even a close second place.

On balance, my opinion again, I think these programs have served our nation well for better than two centuries.

Within VBA, our mission is fairly straightforward. Our vision is that when veterans come to us, they don't just walk away saying, "Well, that was pretty fast and that was pretty efficient, and you got the answer right."

We really want them to walk away from that transaction feeling like the nation has honored their service. We want them to walk away feeling in their heart that the service was that good. That I feel

like that time I spent in the military, you just helped pay me back with that process.

That's our goal. Thanks for your time. It will take a whole host of initiatives, but we have lots of great folks working on this. And I'm delighted to be able to represent them before you today.

I do thank you for the opportunity to speak before you, and I hope you have a great conference. Thank you all very much.

(Applause.)

JUDGE HOLDAWAY: I've got a little memento to give to Mr. Thompson. That was an outstanding presentation and I learned a lot.

In regard to your history, I was looking in my family's genealogical files not too long ago, and I think I've mentioned this to some people here, but one Timothy Holdaway, who was my great-great-great- grandfather, received a pension in 1831, effective date, 1829, from the Revolutionary War.

(Laughter.)

JUDGE HOLDAWAY: So your history was right on.

UNDER SECRETARY THOMPSON: We're doing much better now.

(Laughter.)

JUDGE HOLDAWAY: Well, at least Timothy hasn't come back in for new and material evidence.

(Laughter.)

JUDGE HOLDAWAY: But I present this paperweight to you with the seal of the Court on it, and you may or may not wish to display that in a prominent place on your desk.

(Laughter.)

UNDER SECRETARY THOMPSON: Thank you, very much.

(Applause.)

JUDGE GREENE: Okay. Now, it's time to break out to your seminars. Let me remind you to please return here at 3:00 sharply for Mr. Fox's presentation.

Afternoon Breakout Sessions

COMPENSATION & PENSION EXAMINATIONS: EXPERT TESTIMONY OR PHYSICAL ASSESSMENT?

Hosted by Mr. Richard Bednar

MR. BEDNAR: Good afternoon. My name is Richard Bednar. I'm a staff attorney on the Court's Central Legal Staff. On behalf of the Court, I'd like to welcome you to your second breakout session.

I heard Dr. Coulson's presentation earlier this morning. I think you're in for a real treat. It was a very fine presentation.

We'll be talking about compensation and pension exams, and whether they're expert testimony or physical assessments.

Before I introduce Dr. Coulson, let me tell you that at the end of his presentation, there will be a question and answer session. Before you ask your question, if you would kindly identify yourself. The session is being recorded, and when the transcription is made, they'll want to know who is speaking, and if your name is tricky, how to spell it. Please introduce your questions with a brief introduction of yourself.

Dr. Coulson is well qualified to speak to us this afternoon. He has developed a teaching program to educate physicians in proper administration and recording of C&P exams in order to improve the timeliness and the sufficiency of the examination reports.

He graduated in 1973 from the University of Illinois College of Medicine. He has served as both the Assistant Chief of Medicine and the Associate Chief of Staff for Ambulatory Care at the University of Illinois and West Side Veterans Hospital. He is, himself, a veteran.

Would you please give him a warm welcome.

(Applause.)

DR. COULSON: Thank you. Can you hear me all right? Thank you. Then I won't use a microphone.

If you can't hear me, raise your hand. If you don't want to hear me, just nod off and I will know what --

There are two types of physicians that get involved with C&P types of cases. The first one is what I call the physician advocate. This is usually a private doctor, or it could be a VA doctor, that acts as the treating physician for the veteran. And these are people that act very much as the advocate of the individual, very much like a lawyer would represent a client. And these are the ones that help well ground a case.

Those are not the ones we're going to talk about today. Today, we're going to talk about the

second group of physicians that do not know the veterans. They really act more like an expert witness in a court of law, looking at the evidence, examining the veteran, and answering very specific questions that either the RO or BVA asks.

In fact, in Chicago, we do not allow a physician that knows the veteran and treats the veteran to also act as the C&P physician.

Now, up until about five years ago, I had difficulty in Chicago because many of the cases that we did complete and send to the RO were sent back to us with the word, "Inadequate" or "Insufficient for rating purposes." And my doctors were very upset because they said, "I am a physician. I know what I'm doing. I don't get cases back for treatment purposes. Who are these people at the rating boards saying that my cases are no good?"

So we sat down and said, "Well, now maybe the rating specialists and the physicians are speaking two different languages. Maybe the questions are different. If you don't quite understand what the questions are, and they may even be answering the wrong questions.

So let me show you a little bit of what it was that we had decided over the period of years, and what we did in Chicago really to change the teaching of our physicians.

Basically, if this is an examination)and the doctors are asked to do all kinds of things) the first thing we have to do is review the C file, and that could be inches, feet, or miles thick.

Number two, look at the 2507 request from the RO. What are the exams that are requested?

Look at the BVA remand. What are the specific questions asked by the Court?

Perform the examination by doing a history, a physical, and finally, giving an opinion. And in the past, most of this went to the RO, and the RO looked at it and they said, "What is all of this stuff? It isn't answering my specific questions. It isn't doing what I asked you to do, and it came back as an insufficient."

So what we did is we developed a training program for the doctors, and we said, "Let's find out, doctors, what it is that doctors traditionally do in medicine, and let's find out what it is that the rating board wants."

And once we did that, and once we started doing a new type of examination, interestingly enough, the RO has come back to us and said, "Aha, the new examinations are different. They're better."

(Laughter.)

DR. COULSON: "They answered the questions. BVA remands are okay, and were accurate."

(Laughter.)

DR. COULSON: I know who to keep happy around here, don't I?

(Laughter.)

DR. COULSON: The biggest problem was that doctors speak medicalese. Lawyers speak legalese. Doctors deal in possibilities. Lawyers deal in probabilities.

What the doctors were doing, they were taking the specific questions that the regional office asked and saying to themselves, "These aren't medical questions that were just asked of me. I'm going to rephrase this into a medical question."

Then they answered that medical question, sent it back. Of course, that wasn't the answer to the question because they changed the question.

So we decided to do two things: Figure out how it is that doctors are traditionally trained, and what they probably shouldn't do in this exam. And, number two, look at what it is that the regional office and what the law said that doctors are supposed to be doing and have them do that.

So I'm going to show you a little of the training program that we use in Chicago. Would someone turn off that back light just right by you there.

Many of the things that you see here are things that you already know, but I wanted you to see what it is that we actually teach our physicians.

The first thing is, how is it that a doctor thinks, and what is it that we learn in medical school that makes us do what we do?

It might be interesting for some of you lawyers out there to see why it is that doctors write the type of reports that you see so frequently.

Medical training. The first thing that we learn in medical school is to develop a close physician-patient relationship. It is certainly an advocacy type of relationship. You represent not only the health care needs of your patient, but you represent them as a friend, sometimes family member, someone who really speaks for them.

The second thing we have learned in medical school is to use the scientific principle, the same scientific principle that any scientist would use. The first thing is you have a hypothesis. What do I think may be the problems?

Number two, you gather data. You get information.

Number three, you discuss the data and arrange it and see if it makes sense.

Number four, you develop a plan, and finally, draw conclusions.

Now, that's the scientific principle all of us know about. Let me show you how it works with medicine.

A hypothesis in medicine is called a "differential diagnosis." A differential diagnosis is a list of all of the possibilities, put in the order of probability.

Let me give you an example. I had a patient that came into my office the other day, 67 years old, had a heart attack three years ago, and he said, "Doc, two hours ago, I got this severe pain in my chest."

Knowing that he's 67 years old, had a heart attack in the past, the first thing comes in your mind is, could he be having another heart attack? It's a possibility.

Number two, could he have strained himself? Sure.

Number three, could he have a tumor in his chest that just suddenly started bothering him two hours ago? Lower probability.

Number four, could he have a terrible infection, terrible pneumonia?

Number five, could he have been shot in the chest? Obviously, that's pretty low down.

To find this out, I have to gather some data, and the data for a physician is called the history and a physical.

Now, a history are things that we ask the patient. The things a patient tells us are called "symptoms."

Now, symptoms I can get by talking to a patient in my office or over the telephone or over the Internet or by letter because it's the way the patient interprets. It's the patient's opinion that I'm asking for. Pain is a patient's opinion.

So a patient could call me and say, "I had pain for two hours." He could write me a letter and say, "I had pain for two hours," or he could say it in the office.

A physical examination is entirely different. That's a doctor's observation. You could only do that in the office or when you're with the patient. You can't get an observation over the telephone or in a letter.

And what we find here, we call "signs." Now, sometimes, a complaint could be a symptom and a sign. The veteran could say, "I had my right leg amputated in the past." That's a symptom. And you look, and you say, "Yep. Your right leg is amputated." So, the symptom and sign are all the same.

But a pain, such as chest pain, is something the patient tells me. I can't look and say, "Yep, you have pain. No, you don't have pain."

I can see a grimace on their face. I can't tell what that means.

The next thing we do is we have a discussion.

Oh, by the way, this patient, I ask, "What happened today at 2:00, two hours ago?"

The patient says, "I was in my basement, and I was trying to bring up a box of books of my daughter's, and it was very heavy, and I slipped on the fourth step up, and I fell down the stairs, and the books came tumbling down on top of me."

Well, now already, just with that information, my plan and my discussion is updating this differential diagnosis. Now, suddenly, trauma goes a little bit higher on my list. Heart attack goes a little bit lower. I still have the shot in the chest way down at the bottom. But some information changes my differential diagnosis.

Now, I'm going to have a plan which says I need a few other things to help me. I need some laboratory tests. I would like to get a chest x-ray to make sure that there isn't a fracture. I would like to get an electrocardiogram to see if there are any acute changes to the heart.

And, lo and behold, the electrocardiogram is normal. Chest x-ray shows two broken ribs.

Now, my final diagnosis, obviously, is a "final" differential diagnosis. Now, it is "fracture of two ribs, secondary to falling down the stairs this morning while trying to carry books," okay?

So that's the way a doctor normally does things.

We tell doctors that a compensation and pension examination is different. A compensation and pension examination is examining parts of the body and giving opinions based on specific claims that a patient has already put in through the regional office.

And be very specific and follow the rules and regulations, and answer the specific questions that are being asked.

Definitions. Compensation is benefits given to veterans who have an illness or injury the VA recognizes as being related to their military service. So it's a relation between this and that, nexus.

Pension. Benefits given to veterans who are disabled and unemployable due to conditions that may not be related to their military service.

A compensation and pension examination is an examination ordered by a regional office to determine the existence or status of a medical condition or conditions for rating purposes.

I have to explain to my doctors, "This is for rating purposes. This examination is not for treating purposes." In fact, I tell my physicians, "When you're acting as a compensation and pension physician, take off your treating physician hat, set it aside, and put on your compensation and pension examination hat because you approach this differently."

As a compensation or pension physician, you are not the advocate for either the veteran or the

government. You are there as an expert, unbiased witness, answering specific questions posed to you by either a lawyer or a judge on a specific question. And that's the hardest thing the doctors have to understand.

The request form, 2507 request, contains the demographics, who the patient is, Social Security number, the priority of the exam, whether it's an original, an increase, a review, a pension, or BVA remand. The selected type of exam that's requested. The current rate of disabilities, if there are any.

And, finally, general remarks. Very specific request. And I tell my doctors, read this section very carefully because this is the section in which the rating specialist is going to explain specifically what they want to have done.

The claims folder, even though it's large, has three sections. But, doctors, I want you to concentrate on the center section. This contains the service medical records usually in a manila envelope, previous C&P examinations that have been performed some time in the past, private physician reports or personal statements or buddy statements. Anything the veteran has put forth as evidence. And if it's a BVA remand, the actual remand itself.

There also are exam worksheets. Each type of examination has a specific worksheet which explains how to perform that examination and what specific tests to order.

And we explain to them that the worksheets are really based on the rating schedule itself, but are written in a more doctor-friendly manner so that they can understand what specifically the rating book is saying.

And if an examiner, for any reason, believes that a test or procedure that is requested is medically contraindicated, then the examiner must document a rationale why they are not doing it. A good example would be a chest x-ray in a pregnant woman. Even though the rating schedule or the worksheet may say, "Need to have chest x-ray," we would say, "The chest x-ray was not ordered at this time because the female veteran is pregnant."

Most doctors have never heard of these types of examinations before they have done C&P, because it's not part of the typical medical lingo, and certainly nothing you learn in medical school.

A service-connected original claim. It actually is a claim in which the veteran is claiming a condition or conditions that he or she believes are related to the military service, and this is the first time the veteran has applied for these conditions.

Doctors, what you should do is take a detailed history of the claim condition or conditions from its origin until today.

Now, the origins could be during military service such as, "I fell out of a Jeep. I hit my head. I had stitches taken, and now I have headaches."

Or it could have started before he went into the service, such as "I had headaches for years and years and years, but I did fall out of a Jeep." It made them worse, and therefore, I'm suggesting that

there is a aggravation or a worsening of a pre-existing condition to what was there before.

An increase claim is different. This veteran has already received a rating for this condition or conditions, so they're already service connected. But in this case, the veteran believes that the condition or conditions have increased in severity since the last exam.

So, doctors, what we want you to do is take a detailed history of the claim condition or conditions from the date of the last C&P exam until today.

We already have documentation of what happened from the military up to the first C&P exam or the last one. Now, the question is, what has happened since that time?

Have the headaches gotten more frequent? Have the headaches gotten worse?

Has the patient had to have some kind of surgical procedure? Have they had an MRI?

What has changed since that period of time? What can they -- what can't they do now that was different than the last exam?

A review claim is different, again. The veteran has received a rating and is service connected. But this time, it's not the veteran asking for the exam. This time, it's the VA is requesting an examination to see if a condition or conditions have changed. They really want to know has it gotten better, right? Really.

Now, many times, they haven't gotten better. It may have gotten worse. But it really is the VA checking to make sure that we're not giving the veteran more than they're entitled to at the moment. Okay.

Sometimes veterans come in very upset about this type of exam because they think that they are automatically going to get a decrease in the benefits because they're being called in.

We ask the doctors to do the very same thing again. Take a detailed history of the claim condition from the date of the last C&P exam and see what the patient can do today versus what they could or couldn't do at the last exam.

Non-service-connected pension. This veteran is claiming that he or she can no longer work due to injuries or conditions which may or may not be related to military service. Here, we ask the doctor to take a detailed history of the claim conditions and really do a complete exam.

Finally, the Board of Veterans' Appeals, BVA, remand. This veteran has appealed a ruling made by the regional office. For some reason, they haven't liked what the regional office decided, and the Board of Veterans' Appeals in Washington has sent or remanded -- "Remand" is a word doctors didn't know. That must be something that lawyers learn a lot. Most of my doctors had no idea what "remand" was. Send it back, right, to obtain specific information. Now, on these, I tell my doctors to read very specifically what the question is. Don't make up new questions. Don't examine things that weren't asked for because that can open up Pandora's box to all kinds of new problems that may

or may not be well grounded. And if the doctor brings those up, there is a suggestion that the doctor may be suggesting that they're well grounded, and my doctors don't do that.

Now, the examination. Review the claims folder and the remand instructions before seeing the veteran. In fact, that's very important to do anyway. It is very nice, when the patient walks in the room, and you say, "Good morning, Mr. Jones. I'm Dr. Coulson. Have a seat. I have just reviewed your C file, your military records, all of your claims, and they're all sitting on my desk."

I think that connotes something to a patient, that there is somebody here that has reviewed his record, that everything that he has given to the VA before has been looked at, and to make sure that we're answering the questions that are asked.

Terminology. This is one of the hardest things to get across to doctors.

I said before that doctors deal in possibilities. Lawyers and judges deal in probabilities. And my doctors have a hard time using these words, "a probability." They like, "It's possible." "It could be." "It might be." " Rule out," you know, all the things you've seen before.

So I say to my doctor, Just decide on one of these three things. "Is it more likely than not? Is it a greater than 50-50 probability? Is it at least as likely as not, which means the probability is 50-50 or greater, or is it not as likely as not 50 percent?"

And use those terms. We see those terms all the time from the Board. So turn right around, doctor, and say, "Yes, in my opinion, it is more likely than not, at least as likely as not, or not at least as likely as not that the present condition is related to the military condition."

How to conduct an examination. Review the claims folder. Review the claims folder before seeing the veteran.

Do not say to the veteran when they walk in the door, "Why are you here?" "I have no idea what I'm supposed to be doing today." "I don't know anything about you." That doesn't make you feel good as a consumer, no matter what the service is.

In the report, state whether or not the claims folder is available for review. State, "The C file is available and has been reviewed by the examiner," or, "The C file is not available to the examiner."

Now, most people agree that this is a good statement. I have some of my rating specialists that don't like this statement, and I will tell them that you can't have one without the other.

If we're going to state that we have reviewed it, then we should state that we haven't reviewed it. In medicine, we always -- when we see a patient in the clinic and the medical record is not there, we always start off by saying, "The medical record was not available today." That reminds us six months from now, a year from now, two years from now when we're seeing that veteran again, or if we're called in to a court, that we were deprived at that moment of all of the factual information.

It also connotes, I think to everyone, that most of what's in my report is from the patient's history

because I didn't have facts to see. This has helped me a lot in getting the C files from our regional office.

(Laughter.)

DR. COULSON: Up to five years ago, I received less than 20 percent of the C files for all the exams. Eighty to 85 percent of the time, we did not have paper records of anything. Now, 99.9 percent of the time, we do have the C folders.

I had to make a deal with my regional office to promise -- give them my first born baby, if I lost a C folder.

We don't. They're all sent to me personally. I check them out. I give them to my doctors. I check them back in. I make sure they get back.

So that is the tradeoff that we have made in Chicago to make sure that we do have all the information? My doctors like it much better, and I think the veterans appreciate the fact it is sitting on the doctor's desk and the doctor has reviewed it.

Follow worksheets, doctor. The worksheets were designed to help you do a good, adequate examination. Do not order any diagnostic tests or additional examinations not required on either the 2507, the worksheets, or the BVA remand. Now, that's a lot of latitude right there. If you do order any other tests, make sure and give a rationale for it.

Why do we say this? Because everything that pertains to the rating of that person is included on one of these things. This keeps my doctors from going off on a tangent and trying to work up something that isn't a claimed item at the moment.

Now, what do we do if a patient comes in and says, "Yes, I know it's my left shoulder that's claimed, but I really also want to claim my left knee"?

What we do right now is, I tell my doctors, "Don't go ahead and examine the left knee today because we're not sure whether that's well grounded."

We do have rating specialists at our medical center sitting next door to my doctors. My doctors are told to simply excuse themselves from the veteran and say, "I'll go and check it out." Go and talk to the rating specialist. Say, "The veteran would also like to be seen for the left knee. Can you quickly review the C file and tell me whether we should do that exam today or not." Many times, the rating specialist will look at it and say, "Oh, yes, they did have an injury in the service for their knee, too. Sure. Go ahead and include that." My doctors then do the exam that same day.

In the old days, we would say to the veteran, "I'm sorry. We're only examining you for the left shoulder today. You have to go home. Go back to the regional office. Put in a new claim." And you know what that does to the veteran. That just makes them angry and prolongs the whole process.

But, again, we don't want our doctors making that decision. We want the RO making that decision for us.

Diagnoses. A definite diagnosis must be given, Doctor. Don't say, "I don't know what the diagnosis is," or, "It's an unknown diagnosis."

For the presumptives or the diagnoses of unknown diagnosis, what we do is we put down, if it's a strain or whatever it is, "Strain of unknown etiology," okay, but that becomes a diagnosis now because it's a "strain of unknown etiology," instead of, "I don't know what the strain is about." Okay. It's the way it's worded.

The following terms are not acceptable. "Rule out," "status post," "history of," "possible," all the things that doctors are taught to write in medical school. This is exactly what we're taught to write.

Why? "Rule out" is a differential diagnosis. This lets you understand all the things I'm thinking about. Rule out heart attack in my first patient. Rule out fracture of the sternum or the ribs.

Status post. The status of this is something that has happened in the past. Status post surgical procedure.

"History of" generally connotes that the patient says this, but I don't have facts in front of me to prove it. The patient says, "I fell out of a plane and my parachute didn't open," but I don't see any evidence of that in the medical records at all, okay?

And "possible." Again, this is the doctor's need, to say "possible," and not "probable." So we don't use these terms now.

That's the way we basically work with our physicians. Now, before I ask for any questions, I'm going to show you one more thing that we use.

Because I want to standardize what my doctors do, try to get them to all agree to similar types of things, and guide them through what some of the rules and regulations are, we have developed a computerized program that helps them do this, and I'll show you this program right here.

This is a program basically that I wrote and we use in VISN 12, and the doctors can take this home after they've had this little talk that we've had and go back and review some of the things that we've talked about.

Here's an introduction to compensation and pension, definitions, types of requests, before the examination, performing, writing and sampling, and they can click on any of these things and learn a little bit more about the history of C&P.

I'm going to add a few things from Joe Thompson's talk today, I think, because I've learned a few things about the history.

Definitions are the things that we just have seen on our slides. So the doctors can go back and,

again, see what a compensation, a pension, C&P examination, request form, claims file, and worksheets are all about.

Types of requests. They can go back again and review what a service-connected, original, an increase, a review, a pension, and a BVA remand is and what they should and shouldn't say.

This tells a doctor what to do during the examination and it gives them a suggested timeframe.

You have to realize that if you don't have dedicated doctors in C&P, and the C&P patients are thrown into the typical clinic schedule of a busy hospital, they're going to be given a 20-minute appointment, just like everybody with diabetes and hypertension has.

First, before the examination, and we allow 30 minutes just for this, review the C file, including the service records, and I tell you that even 30 minutes is a pretty short time, right?

Oh, but some of you, when you review these BVA, it takes hours. It may take you a half a day, right?

Well, we don't have that time, but I want the doctors to at least spend 15 to 30 minutes going over the files.

Now, if they already have somebody who's helped them, such as the BVA, who's already helped by summarizing the case in five or six pages, or the regional office rating specialist, who has helped summarize, that helps the doctors, or if we have little tabs or stickies in the folder that says, "Doctor, be sure and look at this patient."

Review the previous C&P exams, especially for increases and reviews. You have to do that.

Review the 2507 request, including the remarks section. Review the BVA remand itself. And we have learned that you have a lot of hand drafts relating back to the law.

And whether those are put in as footnotes or put in as paragraphs, I have learned I can glance over a few of those because it's your need to document what it is that you're saying, but I have to get to the paragraphs that really say something.

Would you highlight this for me and make it easier? You know what I'm talking about, and follow the instructions on the worksheets.

Performing the examination. We allow 30 to 60 minutes just for the examination itself with the veteran. One of the things that veterans many times say about C&P exams, "The doctor only spent 10 minutes with me. How would they know anything, right? They really didn't spend enough time to answer my questions, to ask me things." Sometimes they didn't even do a complete examination, according to the patient, you know.

Usually, what happens is, if it's a knee injury, right knee, I have my doctor explain to the veteran at the beginning. "Now, it's the right knee that you're claiming. Is that correct?"

"Yes." "So it's the right knee that we're going to be examining today." So they don't expect that it's going to be the left shoulder and the back and everything else being examined, and so they don't think that they're really here for a complete examination, except if they're less than one year out or have a general medicine exam.

But we allow 35 or 40 minutes just for the examinations for all types of examinations, except for PTSD, and for those, we allow one and a half hours because sometimes it takes a while for the veteran to loosen up and even talk about the condition.

So we're talking about, overall, one and a half hours total for standard exams and about two hours for a PTSD exam.

Explain the process to the veteran. Tell the veteran you have reviewed his or her records, and I always show them the record sitting on my desk so they know they're here.

Be compassionate and listen. We are here to be compassionate. Even though you're not the patient's advocate here, like you are as a treating physician, we still have to act compassionate and listen.

Follow instructions, and then, at the very end, the most important thing, always ask the veteran, "Do you have any questions?"

Many times, veterans leave and they say, "I didn't get to ask a question that I wanted. My doctor didn't ask me what I wanted him to ask me." So we give him that little opportunity at the end.

If, indeed, they have a medical problem they want to be seen for that day, we will say, "I, as a C&P doctor, can't treat you, but I'll be very happy to walk you down the hall and you can see a treating doctor for that condition today."

Or if they have another claim, "I'll have to take you over to my rating specialist," so the veterans kind of feel a closure, and they've had some time to say something at the very end.

Writing the report. A report takes a while. It takes five to ten minutes, even if you're dictating the report. Doctor, include the veteran's name and Social Security number, include the 2507 request information, including anything in the "Remarks" section.

Indicate that the C file or BVA remand were reviewed.

Do an adequate history and physical examination, including the findings as shown on the worksheet.

Answer questions on the request or the BVA remand and answer all opinions, using wording that's in the remand itself. Don't change it.

So if the remand says, "I would like for you to give an opinion as to whether or not it is as likely as not or not as likely as not that his present joint condition is related to the injury in the service,"

just take one of those two verbatim and put them in your opinion statement.

Now, for doctors who haven't done this before, this is just a little sample computer program that allows them to do some things using a "word processing generator." This allows the doctors to click on certain things and generate text.

Our doctors have to have a typed exam in the evening, and they can do it in one of several ways. One way, they can actually type it in.

Number two, they can dictate it and have somebody type it. They review it, edit it and sign it.

Number three, they can use a text generator, such as this.

Number four, they could use voice, or number five, they could do something I hadn't even thought of in the past.

And let me show you what this type of program does. Let's just type the patient's name and his date of birth. It generates his age, telephone number.

Okay. It's starting to generate our report for us, and the report is all down here in this word processor. We know the patient's name, Social Security number, date of birth, age, sex, race, telephone.

Now, we can go down and click on the RO request. Now, at my RO, I use one of three RO's, Chicago Regional Office, Indianapolis, Milwaukee. We'll choose Milwaukee for this one.

Priority request. We'll say an "original SC." It is for a joint, currently rated. Well, let's see. Original. Let's change this to an increase, and let's give him a current rating of ten percent for feet.

And we'll say this whole thing happened in 1965 at the age of 25, and it happened where? We'll say it happened in Vietnam. Branch of service, Army, during military service or advanced training.

Again, up here, I can change any of these that I want to. I can change information obtained from the patient, or if the patient is incompetent, it could be a wife, husband, mother you're receiving information from.

C file was reviewed. And, again, this is starting to add more information to the form.

Now, I can go to the history and we can say that this began three years ago when he was climbing stairs.

Speed of onset, intermittent, and these are all the things that doctors normally look at, and you can click on anything you want.

And what we're doing, we're starting to develop a report. I'm just clicking on things right now.

Okay. So it began three years ago with an intermittent onset. It occurred constantly. It occurred during climbing stairs. It was accompanied by jaundice. It began in the face, chin, and the left side.

You can just keep doing this, since this is a text generator.

You can actually do physical examinations here. Range of motion. Let's just do a couple of these on the right side. Let's do the right ankle.

This is the normal motion of the right ankle. Plantar flexion which is flexion is 45 normally. So let's say this one has 40, and he develops pain at 35.

His dorsa flexion is 15 and he develops lack of endurance at 10. And you can do the very same thing with hips, shoulders. Again, it shows what is normal, so doctors don't change and develop their own scale.

And when you actually print this, here it is. The range of motion of the ankle on the right side. Flexion, plantar flexion, is normally zero to 45. This patient had 40 degrees, limited by pain at 35.

So it's a way of getting your doctors used to the typical jargon and the DeLuca requirements without beating them over the head.

For mental examinations, if we're going to do a PTSD, for instance, this actually walks them through a DSM-4 PTSD exam, allowing you to move on when each criterion has been satisfied.

DSM-4 says that first you have to have the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury or a threat to the physical integrity of self or others.

So that might be, "yes." If you were in Vietnam and you were shot at or your buddy was killed right next to you, that may be the case.

Then the person has to have a response involving intense fear, helplessness, and horror. If both of those things are satisfied, the next box lights up and you can continue.

The event happened where, or what happened? We'll say, "sight of injured or dead people."

When did it happen? "In the military," and, again, you can choose all of these things that you would like.

Again, you can't go on until you've satisfied all of the information that is necessary. Symptoms began within six months. The answer is, "yes."

Symptoms lasted one to three months. Fine. Now, the next thing it says, "If the patient's avoidance of stimuli was associated with trauma and numbness or general responsiveness," and you have to have three or more of these, according to DSM-4. So let's give them three, and as we give them three, this box lights up.

Traumatic event was reexperienced? We'll say, "yes." And you see what's happening. As you do this, there has to be two of these.

And as we click on the second one, it says, "Criteria for PTSD is fulfilled." You click on that, and you actually have written the entire PTSD exam, including all of the things that are important.

Now, for my doctors who say, "Even that is way too much work for me, and I can't even type," most of that typing was just clicking with a mouse. You didn't see me doing a lot of typing. So even somebody who can't type real well should be able to do that.

By the way, for legal opinions, something like this would be very good because you could just click on paragraph number 584 and, zingo, the whole paragraph would go in, right?

You wouldn't have to have all of your secretaries do all of this stuff for you, right?

Also, there's voice. How many use voice in here? Anybody? My voice is starting to go. We'll see what happens with voice here.

"Begin dictating." "This is the first hospitalization for this 24-year old white male, comma, with a past history of congestive heart failure and diabetes, period. The diabetes began 20 years ago, comma, and the patient has been on insulin ever since, period. Stop dictation."

"Dictation is done." Okay. You hear it talks back to you. It tells you when things have stopped. Okay.

(Laughter.)

DR. COULSON: "This is the first hospitalization for this 54-year old white male, comma, with a past history of congestive heart failure and ideas. The diabetes" -- okay. Got a word wrong here, right?

-- "began 20 years ago, and the patient has been on insulin ever since."

Now, did I say, "ideas," or did I say, "diabetes"? If I want to train my computer, I want to make sure that I really did say, "diabetes," because if I said, "ideas," it was wrong. I mean it was right, I'm wrong.

So now listen carefully. I'm going to go back and click on that word, and you're going to hear what it was that I said. "Ideas."

Okay. My guess is I didn't say "diabetes" real well there, okay, and the reason that I know that is because it picked it up over here, okay? So that was my fault.

So I'm going to say, "No. Don't change it, computer. Don't change what you think I said."

On the other hand, if I said, "diabetes," and I think that's the way I normally say it, then what I do

is I tell the computer, "No, that is what I mean, and here's the word, and remember it from now on."

So in this case, what we're going to do is we're just not going to save this.

Voice programs are very good. They're better than doctors and children because you teach them something once and they remember it forever, okay?

So if you are very good about teaching the computer every time it makes a mistake, what you really want to type when you say that, then it will type that.

For instance, if a cardiologist, which I am, has done a normal catheterization today, I normally have a whole phrase that I print. "How the patient has been sent for catheterization, how patient was prepped, how patient was anesthetized properly over the area," blah, blah, blah. We advanced the catheter, and did all these things." I can teach the computer that when I say, "normal catheterization," to then print off this whole paragraph about the things that I normally would say about normal catheterization, okay.

So for things that we do repetitiously, voice is very good because you can teach it with a special cue word of yours, you develop a macro in which it types everything for you.

So what we have done with all this is told our doctors, "Your job, Doctor, is to review, perform and get a written report typed into the computer. How you do it is up to you. You could type, you could dictate, you could use a computer program to choose, you could use voice." So there shouldn't be any excuse for doctors not getting exams typed into the computer.

Now, let's stop at this point -- I think my voice is going anyway -- and see what questions people have. And when you get up to ask a question, make sure that you make your name very clearly known so we will get it on the transcript, and if it's a difficult name, spell it for us.

Do you want to, while you're there, just click on the lights, please?

Yes, sir?

MR. ZIMMERMAN: Edward Zimmerman, Z-i-m-m- e-r-m-a-n, and I'm a military veteran, National War Center in Minneapolis.

Can everybody hear me? My question is whether you have an "other" blank in general in your choices so that if a doctor finds something that doesn't fit in the model, he can be more specific?

DR. COULSON: This, as I said, is a word processor, so you can type anything you want.

Computer programs are only good for things we do all the time. It's very hard to have a choice for every possible exception of the rule, but, yes, you're right. If there's an exception, we expect them to type that exception in.

MR. ZIMMERMAN: (Inaudible.)

DR. COULSON: You have to remember that computers are machines to help us. You still have to have a good thinking person using them, right? So just because you're using a computer doesn't mean you shouldn't think. So you're saying we should think, too.

MR. ZIMMERMAN: -- (Inaudible.)

DR. COULSON: Yes. Absolutely right. This is just to help them with the standard type of things and also to show them the typical types of things that might be asked of them.

Yes, sir?

JUDGE KRAMER: I'm Ken Kramer. I'm a judge on the Court, and I'm wondering if the doctors understand clearly that related to service is temporally related, in other words, time related, not necessarily related to an incident that occurred on active duty.

I've seen a lot of opinions where it's very unclear to me that the doctrine is understood that if it happened on the off-duty hours while the person was in military service, it still would be legally related to service.

DR. COULSON: Well, again, we try to say when it happen -- was it not there when they entered the service? Was it there when they exited the service?

I think that's the easiest way to find out. If you look at a lot of our claims, there's an awful lot of our claims that really have nothing to do with being shot, right?

Yeah. Skiing accident, right? Playing ball. Shooting yourself in the toe, right? Horsing around in the barracks.

But, again, I think the rule of thumb is, if it wasn't there when they went in and it was there when they go out.

This is very true of diabetes and hypertension. My doctors have a great deal of difficulty saying that diabetes was due to being in the military.

So I say, "Well, that's not the question. Was it seen when they went in?"

"No." "Was it seen when they went out?" "Yes." Now, many times, the reason it wasn't seen when they went in because there wasn't a very good entrance exam. But that's a different issue, right?

So we do tell them all those things. Yes, ma'am?

MS. SCOTT: I'm Carol Wilde Scott from Linden, Virginia. My question is when they review the records which are not VA records, private physician records, are they instructed to examine and review the testing that was done by the private physician because not always is the private physician the advocate?

Some of us are smart enough to get reviewing, examining, valuating exams that include sometimes things like EMGs and arterial studies.

Are they required to review those, and to what extent?

DR. COULSON: We do not go out and solicit any information on our own. We review only things that are in the C file.

If it's in the C file, we generally do not go back and make an opinion as to whether the previous opinion was a good one.

Is that what you're suggesting, that we would go back and look to see whether or not we think the private doctor did a good job in evaluating the veteran correctly?

We do not do that.

MS. SCOTT: (Inaudible.)

DR. COULSON: No. No. I don't see it that way. I see the question to me at the moment is, what do I think the veteran has, okay, and what kind of proof do I have to substantiate that. We generally try to stay away from going back and giving a negative opinion about what someone else has done unless we're specifically asked that question.

Now, once in a while, we are asked to perform a reconciliation of diagnoses. One doctor said, "No PTSD." One doctor said, "PTSD." What do you think? They want a tiebreaker, is what they want?

For that kind of condition, yes. We would go and we would look at what someone had said in that first exam and what someone had said at the second exam, and either have one person, or sometimes a board of two or three, make a final decision.

But, no, I certainly don't routinely go back and try to determine whether or not previous examinations were done correctly in either C&P exams or private exams.

Has anybody ever suggested that we do do that? I mean I -- that's an unusual question. That's not one I even anticipated.

MS. SCOTT: In the event that the condition is something which is, say, nerve damage, how then do your physicians evaluate whether or not that condition exists without performing tests, or do they, in fact, perform those tests?

DR. COULSON: Oh, I'm sorry. Oh, yes. We would perform the test. I thought you meant should we -- do we go back to see whether the previous doctor had performed the test properly.

We perform the test, and if we find the test is positive, we would say it's positive. If we find it's negative, we say it's negative.

That may not always agree exactly with what someone else found. Yes. You're absolutely right.

You had a question?

MR. KRASNEGOR: Sure. Actually two things. My name is Dan Krasnegor, and it's K-R-A-S-N-E-G-O-R.

My first question is, do you instruct your physicians to take the history given by a veteran of his symptoms and to take those at face value, and address whether or not, based upon those symptoms, a condition might be related to service?

And the second question I have, and I'll be brief is, a number of my clients -- and I'm an attorney, private attorney who represents veterans -- are distressed often by the use of their race in the descriptive terms that are stated at the top of an exam usually.

Is there a specific reason that race is used as an identifier?

Those are my two questions.

DR. COULSON: Yes, certainly from a medical point of view this is because there are certain diseases that are seen in one race, such as sickle cell disease, except in the Mediterranean white population. That's pretty much a disease of African-Americans.

We do take what the veteran says. Somebody asked me in my first year, "How do you know that the veteran is telling you the truth and how do you know it's a factual statement?"

If a patient tells me something that makes sense and goes along with all the other information, I put it down as factual.

If they say something that I really can't prove, or I really have doubts about, I do use the word, "history of," in the body of the exam. Not in the final diagnosis.

So when you see me or one of my doctors say, "history of," it generally means that the veteran said that. It may be true, but I don't see any actual proof of it at the moment.

But that certainly doesn't mean that it didn't happen. And with things like symptoms, it's very difficult for any of us to say that someone does not have pain all over their body in every toe, every finger, nose, ears. But I think it would be very unusual.

But something like that, when they say, "I have pain in every part of my body," I would probably just say, "history of pain in every part of his body," just to connote that there's a question in my mind, but who knows, right?

MR. KRASNEGOR: The only reason I ask is that, under certain circumstances, the law will presume for certain, you know, initial phases that a veteran is telling the truth about his symptoms, and oftentimes, I'll find that an examiner will simply say, "Look, this is not confirmed in the record.

I'm not going to comment on that." And that tends to not necessarily help the process along.

DR. COULSON: Now, I think our job is to include all the information. Maybe to give you a feeling as to the possibilities or the probabilities, okay?

But then, many times, it will come back from the RO or from BVA saying, "Be much more specific. Give me an opinion as to whether or not you think it is at least as likely as not."

If it's one of these histories of all over the body, I probably would say, "I do not think it is at least as likely as not that every part of the body hurts at the same time."

Yeah. But that's my opinion, right? That's why I always say, "opinion."

Sir, you had -- did we just cover it?

MALE VOICE: You certainly did.

DR. COULSON: Oh, wonderful. Thank you. Yes, ma'am?

MS. BRANTLEY: Meg Brantley with the National Veterans Legal Services Program.

I have a question about compliance and whether -- how do you know whether your doctors are complying with the instructions and procedures that you have set forth? And the reason I'm asking is because, one, I think it's very rare for us to see that veterans who are going in for a PTSD get the one and a half hour or two hour exam that you discussed.

I think that, more likely, veterans relate to us that they get the regular maybe 20 minute, at the most, or half hour or something like that, for a mental disorder.

Also, I was in Milwaukee recently and was handed a stack of probably about eight cases, and these were all mostly original claims for service connection. And in four of them, the rating members had a cover sheet on there, returning the examination report because it was incomplete. So this was -- so half of the cases that I was handed there, the raters had found that the examiners did an incomplete job.

And, also, I just wanted to comment on what Mr. Zimmerman had mentioned earlier. This is a little -- this computerized examination report is a little -- it explains a lot, seeing you go through this, because I find that a lot of examination reports are very depersonalized, and I think that is they tend to use boilerplate language, and I see how that boilerplate comes into being now.

And it makes it very difficult for an advocate who -- you know, every veteran's story is personal. It's not depersonalized. And so I could see how a lot of those little details get left out.

But my main question had to do with compliance.

DR. COULSON: My last little comment just happens to be have you read a BVA remand lately,

because I think that is the ultimate in using a boilerplate. But that doesn't mean it's bad, okay? I think there are a certain number of things that you just have to say.

I mean when my doctors give me a report of a normal chest and they say, "The heart size is normal and the lungs are normal, and there's no masses seen," I say, "Be creative. Use some other terms. You know, talk about their ears or their nose or their toes."

And they say, "No. This is the chest. This is the way it is."

So I guess we don't want to make -- we don't want to get doctors in the habit of just clicking and not reading because the computer does not solve the problem of having a person responsible for what they write. And you still can change anything that you write, so this is just to create some uniformity.

How do I know they do it? That was the first question. Compliance.

Well, I know if my doctors do it because I read every exam before they go back to the RO. I'm the approving official.

But I probably am the exception to the rule, and I don't think VAs always have a physician at every medical center that completely goes over everything before it goes back.

Second, I know that if something isn't right, my regional office is very willing to send it back to me as inadequate or insufficient. So I don't think that they have a tendency to just ignore most things. If the RO doesn't like it, it's going to come back to me. That's certainly why I look at them, to make sure that we do them right the first time.

Doctors are smart enough that if you teach them something once or twice, they should be able to figure it out for the third time. And most of these things are more repetitious than we think.

I mean a joint exam for an ankle, does look very much like a joint exam for an ankle that you've seen before. So I think there is a certain amount of repetition.

The other thing you mentioned in that question?

MS. BRANTLEY: The PTSD exams.

DR. COULSON: PTSD exams. I do not think that most doctors give enough time for C&P exams, period, and I think it's because it comes from the top. It comes from directors and chiefs of staff who don't put C&P in as high a priority as it should be.

I think many of them see that the main job of VHA is treating diabetes and hypertension in non-service-connected veterans, and they forget that the real reason that the VA was created in the first place was to take care of veterans who were injured in the service with compensation, and I think we heard that very well at lunch today.

And I think we need to have that lecture given to directors, chiefs of staff so that they don't look at a C&P doctor who does eight cases a day, because we're doing two hour exams, and say, "Why do you only produce eight exams a day and Dr. Jones down here sees 32 patients for hypertension?"

So I have to keep fighting for that. It's an ongoing battle.

And what I'm showing you here is only Chicago. This isn't nationwide at all. But I am suggesting that we develop some kind of nationwide educational program that does have some standardization so that we are doing things more alike throughout the country instead of more differently, which is what we're doing right now.

Yes, ma'am?

MS. KERNS: I'm Alice Kerns. I'm with the Court.

I'm just wondering is there a process to try to make it nationwide? I missed the very beginning of your talk, but is what you're doing --

DR. COULSON: I'm trying to sell it to you.

MS. KERNS: Sold.

DR. COULSON: Well, I think we have some advocates in VA. I think Joe Thompson is a good advocate. I think that Rick Nappe is a very good advocate, and I think we have done some innovative things that could be used throughout the country, and other people have done innovative things, too.

We were selected to be at the One VA Conference. I don't know if you know we have this "one VA" now, right? We're all one VA, so if a veteran comes to any of us and asks something, we're not supposed to say, "It's not my job." We're supposed to say, "I'll find somebody that can do it for you. I'll call them," okay, and that's the whole idea. So I think that's what we should be doing.

We did start by having rating specialists, instead of sitting five miles away from us at the RO, actually come in and work in our medical center right next door to doctors.

It made the doctors more willing to go to then and find things out. It made them learn things. It made them go and ask the rating specialists, and it's good for the veteran because maybe you didn't have to send the whole exam and have it come back again. You could solve the problem that day.

So these are some innovative things that we have done, but I'm sure other people have done that, too. And it would be nice if we had some kind of national incentive to do this throughout the country.

I've volunteered to do that with some other people.

Yes, Landon?

MR. OVERBY: My name is Landon Overby. That's O-V-E-R-B-Y.

DR. COULSON: You could shout.

MR. OVERBY: I think I can shout. My question is, having gone through the VA system and worked with theRO in Chicago, reviewing records nationwide, we see a failure because many veterans actually go to the VA Medical Center seeking treatment. Their C files are reviewed, but why aren't treatment records being reviewed to see if there are any changes, because not necessarily all the time do the C files have the treatment records, but the treatment records, because they go on zip code, why when the veterans come into the hospital is there a check being made to see if there are some treatment records, and if so, if they are being treated for the disability which is being complained?

DR. COULSON: Okay. I don't want to pass the buck, but as the C&P doctor, I see part of that as the responsibility of the RO.

If the patient comes into the RO and says, "I have a claim for this and I'm going to this VA," I would think, long before they ever send a request for a C&P exam, the RO should get those private doctor -- and really, it's the private doctor because the VA is acting as the private doctor -- reports.

I have shied away from having my doctors go out and try to solicit information that's not in the C file. In fact, I've already seen from a legal point of view that's not the right thing to do, and you can tell me if that isn't current.

But it seems if I were in a court of law and I were posed ten articles of submission to discuss, and I said, "Excuse me. I want to take about ten minutes to go out and see if I can find some more of them and I'll be back in a few minutes, Judge."

He would probably say, "Excuse me. You have to deal with the facts that are on the desk of the Court at the moment." So I guess I see it the same way.

Now, it may be that that veteran is missing out on getting something, but if the veteran tells me during the exam that he has been coming to a medical center and it's not in his records, I will make a note of that.

And I always say at the very bottom, "Patient goes to Hines VA Hospital. The Board can request a report from Hines." And I leave it at that.

So I don't go out and get that information. But it says in the final body of the report that the patient has told me that he goes to another VA Hospital, and I have suggested that the RO get those records. That's how I deal with it.

But I assume if that places the information into the C file when it comes to appeal, I would think that's very important to have.

So that's how I deal with it. Anybody have any suggestions of any other way of dealing with that

while we're here?

Now, you have another question. Okay.

MS. SIMS: Hi. My name is Jackie Sims. Not afraid to admit that this is general counsel for the PGS-7. I know you all heard of me.

One of the main problems we have is that when the exams go back to the regional offices, there is noncompliance, and I'm looking at a *Stegall*. We get the *Stegall* remands.

I think the main problem is that the doctors do not know the case law, okay? If they don't know the case law, they can't comply with the case law, and then the cases come back to us again because the regional offices, the doctors didn't comply.

DR. COULSON: Well, that is what the 2507 is all about.

MS. SIMS: Exactly. That's good.

DR. COULSON: That's predominantly a marked section.

Now, I'm still going to say the *Stegall* law, which would not mean anything to a doctor.

MS. SIMS: Exactly.

DR. COULSON: They would have to say, "In what specifically do you want that done?" We have stopped saying to doctors, from the DeLuca decision, you know.

MS. SIMS: Okay.

DR. COULSON: But it's very easy to say, "Give me the range of motion." "Tell me what they're limited by. Is it pain, a typical ache, or a program like you have just seen actually guide the physician. We will never have doctors knowing the law like you know the law. You'd be out of a job.

MS. SIMS: Right. But also, on the front of the 2507, we'll say, "Do this exam. Do that exam," whatever. And 30 percent of the time -- well, a lot of the times -- they don't comply with the examination that we say for them to do.

DR. COULSON: In the worksheets, you mean?

MS. SIMS: Yes.

DR. COULSON: Okay. Well, the worksheets are very clear. And by the way, the worksheets are updated frequently by Washington, and when they are changed, they change for the entire country. That's one thing that is standardized.

MS. SIMS: Okay.

DR. COULSON: So if the worksheet were changed today nationally in the computer, and I went back tomorrow to see a patient, when I printed it, the new changes will have happened.

MS. SIMS: Okay.

DR. COULSON: I still think somebody can read them and interpret them.

MS. SIMS: Exactly. Yes.

DR. COULSON: Right. It's a personal issue.

MS. SIMS: I commend the Chicago office and Philadelphia. I just came from there. They're doing the same thing. We need standardization. Thank you.

DR. COULSON: Yes, sir.

MALE VOICE: How would you support the veterans appeals? This has to do with the changing forms.

I don't know how your office operates, but on occasion, we have responses to the exams where they're just responding to a sheet, but we have no idea what the questions are.

And as you pointed out, the questions change routinely. The aim issues change routinely. And getting an examination that says, "normal, yes, no."

DR. COULSON: Oh.

MALE VOICE: They probably think you don't know what the questions are. We're left with a -- you had an examination report.

DR. COULSON: Nobody can interpret that. If you just have a list of answers and no questions, no. I mean I think that's right.

But, again, I think if we allow doctors to do that type of thing -- they used to hand write it, you know, on the worksheet.

But then VBA said, "You can't hand write it. You have to type it." So they typed the same thing that they were writing. But, of course, the questions weren't typed.

So if we're going to do it that way, we could also have a computerized program that simply shows the question. You fill in the blank. Although I don't like to fill in blanks, it may solve the problem.

But, no. You can't just have the answers without the questions. I agree. And if you receive any I would send those back once or twice. They would get the message. That's the only punitive way

we have of getting people to comply.

Thank you all very much.

MR. BEDNAR: Won't you please join me in thanking Dr. Coulson.

(Applause.)

MR. BEDNAR: Will you accept this small token of appreciation from the Court.

DR. COULSON: Well, thank you very much.

MR. BEDNAR: Thank you very much.

DR. COULSON: Thank you for inviting me.

EVOLVING AND EXPANDING ROLE OF VETERANS BENEFITS JURISPRUDENCE OF THE FEDERAL CIRCUIT.

Moderated by Mr. Jeffery Luthi

MR. LUTHI: My name is Jeff Luthi. I'm with the Court's Central Legal staff.

I'd like to introduce the panel members to you this afternoon. I'll introduce them in the order they're going to speak.

You will first hear from Professor Jim O'Reilly, professor of law at the University of Cincinnati College of Law, concentrating mostly in administrative.

He will be followed by Dick Hipolit, who is Deputy Assistant General Counsel for the Department of Veterans Affairs. He duties include litigation before the Federal Circuit.

Following Mr. Hipolit will be Todd Hughes from the Department of Justice. He's the Assistant Director of the Commercial Litigation Branch in the Civil Division.

Finally, we will hear from Ron Flagg, who is a partner of Sidley & Austin, concentrating in the commercial and administrative litigation.

Professor O'Reilly.

PROFESSOR O'REILLY: "I come to bury Caesar, not to praise him." And with those words, Shakespeare's dramatic character, Marc Antony, speaking about Rome's most powerful military man, gave us the message for today.

I'm here to argue to you that we should bury the current appellate system for veterans' claims,

deficiencies in the Veterans Appeals process, including the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims, with full military honors, of course, and replace them in the new Administration with a merged system for the five Federal disability determination agencies, one combined, comprehensive appellate structure. Burying what we see in the veterans appeals process today, and emerging with a single merged Federal disability appeals process, using independent Administrative Law Judges, makes great sense from the point of view of the veteran claimant, and for those few lawyers who venture to represent them.

This can be done by the incoming Administration using its Reorganization Act authority, with supportive legislation. I believe it would save money and enhance due process.

The Office of Management and Budget would term this as an overhead target that is meant to be hit. The transaction costs of recycling arise in what one of my colleagues has called the "hamster wheel" of veterans claims, going around and around in remand, that could be cut out.

The message from the page of the VA website called a "Scorecard Fiscal Year 1999," is that it takes an average of 745 days from the time the appeal begins, to the average time for completion.

So if you're dealing with a Filipino Scout or a World War II paratrooper who has got a claim, the current system gives that person the message, "Come back to us October 3rd, 2002, and if you're still alive, we might, on average, have resolved your appeal."

I believe that's an inappropriate, insufficient approach, and so I'm going to argue today that the VA appeal system should be replaced, with a procedural regularity of the current system, that now exists in Social Security as a melded change from each of these five independent systems.

I do not say we should merge the substantive medical or causation criteria. I believe we need to merge how we resolve claims disputes, so that procedural fairness can be achieved.

We would keep the presumptions. We would especially keep the duty to assist. But we would hold accountable those who are responsible for failing to assist and those who have made the system an impenetrable system of traps.

Now, I believe that the radical change of consolidation and merger will occur because if you look at what Gore's reinvention program has done, and if you look at what Governor Bush has done in Texas with the Texas government, I believe that restructuring will replace our current parallel systems and their inefficiencies with a single system, and I believe the single system will have a form of appeals that uses Administrative Law Judges and uses the local Federal Magistrates on appeal.

As a participant in the policy process, I think all of us have a obligation to tell the shadow transition teams, that is the policy branches of the two Presidential campaigns, what we think ought to be the model.

I think the model ought to be a merged disability system.

In the *Tallman* decision, the Federal Circuit used the term "implosion" for veterans matters.

Some would argue that administrative law should speak of "marginal incremental process adjustments being optimal." I disagree. I think the system is so significantly broken that the words used by my colleagues in my previous life as an infantryman, what we carried in the satchel charge was a tool, and what we said was, "Fire in the hole!"

Perhaps today, we should say that the system is broken enough that the system ought to be exploded and replaced with a merged system.

Now, having started with that light and upbeat tone, let me briefly go into some of the issues in the administrative law world.

The Federal Circuit has an important role as the Article III court, supervising the function of the Veterans Administration and its appellate process. The people who manage that system of legislative review are the House and Senate staff lawyers who really have the power to dismantle and replace systems by legislative change.

Few of the people on the legislative staffs who are involved in making legislative decisions are really students of the veterans system at all. They studied administrative law in law school. They studied as political scientists how agencies are supposed to work, and from their perspective, when they look at the VA system, it's aberrational. It's an unknown. It seems to be skewed. It seems to be a very odd way to resolve these disputes.

The Dean of Cornell Law School, Roger Crampton, used to call the three elements of the successful administrative process accuracy, efficiency, and acceptability.

Dean Crampton said, "Acceptability emphasizes indispensable virtues of procedures that are considered fair by those whom they affect, as well as by the general public. The authority of decisions in a society resting on the consent of the governed is based on their general acceptability."

Crampton had it right. The continuing remand cycle in which the veteran never really gets to a decision on his or her claim is not going to be deemed acceptable.

The core problem is that as one of the judges of the CAVC has said, "An actual decision on the merits is very rare." The Federal Circuit, in turn, tolerates endless remands, as in the *Colucci* case, in which the file was ready and complete, but the VA wanted a remand to further stall and to oppose the reward of benefits.

I think we should reach over that particular barrier and build a centralized system which focuses on getting to decisions. If we can do that by merging the systems, with the help of the House Budget Committee, the Senate Government Affairs Committee, and the veterans committees in the House and Senate, trimming the fat and coming to a conclusion makes a difference for the veterans' acceptability of the system.

Right now, the veteran feels trapped in the VA regional offices' incompetence. They feel trapped

in the intransigence of an appeals process, in the uncertainty and inconsistency of the judicial level.

I think it makes sense to clear these cases off the Federal Circuit's docket, and let that court concentrate on what it's created to do, resolve patent and intellectual property disputes at a high quality and a high level of sophistication.

Now, as you've already heard from Mr. Thompson, it's people like me who we drafted or who enlisted during Vietnam, who are the leaders of this system, and we are the people most offended by the qualities that we don't see in the system as it is.

The "baby boom" and Vietnam group are becoming ailing 50-somethings, and we're going to be appealing VA denials at a much greater rate.

Looking at the appeals process from the veterans' point of view, it is an individual matter. The individual wants a remedial resolution in less than 745 days.

Well, which of those veterans would choose to create a system with this series of remands? Who would create the hamster wheel, if given the choice?

I am a former Chairman of the American Bar Association's Section of Administrative Law and Regulatory Practice. One of the fun things about that role was meeting and greeting delegations of people from other countries, particularly Eastern Europe and third world countries, who want to come to the United States and learn about our system of administrative decision-making.

And I will take them and show them the EPA system, and I would show them our FDA system, and I would show them the FCC and Social Security grids and the like.

I would not show them the VA appeals system because I don't want the VA system replicated in other countries.

You really don't need an autocracy in order to get the level of determinism that we now have in our VA appeals system. I believe a more democratic system can be achieved by consolidating these disability systems, and I believe we'll be serving better our society's expectations for administrative fairness, if we do the kind of consolidation merger that I have proposed.

How do we chart the role of the Federal Circuit? You've come in here because, of course, we're going to be talking about the Federal Circuit.

The Federal Circuit has begun to apply the jurisprudence of administrative law to VA, an agency that, for too long, has been outside the bounds of administrative law.

In the September 8th *Dambach* opinion, the Court has signaled some change for the better. The Federal Circuit sometimes gets too distracted on issues like the subsumption cases which, if you go to Home Depot and ask, "I've got a subsumption problem," they'll think you've got a wet basement.

Subsumption and issues like that, on which the courts and the Federal Circuit spend time, distracts

from the real problem.

The real problem is in the *Cole* decision, and to a lesser extent, in *Dambach*. We have to get off this "hamster wheel" of remand and direct the agency to come to a conclusion on the claim.

The Federal Circuit, in the Nolan decision, used the words, "fundamental principles of fairness." The Federal Circuit was scolding the CAVC in Nolan. It said it should not have reopened the threshold issue which had already been conceded.

The debates within the CAVC opinions about the *Nolan* case, increasing after the *Nolan* case, seemed to have been mooted. The Circuit criticized the complete surprise to the veteran of what the CAVC had done. The Article III court there took the responsibility for holding the Article I court to task.

I expect that merger ultimately will take the Federal Circuit out of the veterans claims business, but for the moment, what the Federal Circuit can do is to press the Court of Appeals for Veterans Claims by mandamus or by the appointment of a Special Master, to hold that court, and to hold its agency, the VA, in specific terms, responsible for compliance with the law.

I believe the current system needs mandamus relief for reasons that I'll go to in a minute.

In the paper, for the winter issue of Administrative Law Review, I talk at great length about doctrines like exhaustion, rightness, deference, and issues like that in classic administrative law.

What seems to me, having observed this in some detail under a microscope, what seems to me is that the CAVC's performance on recycling cases is inadequate. I favor that court's view of deference on issues of fact, but I'm skeptical about the way the VA, in turn, treats remands from the CAVC.

Looking at the 1918 veteran whose widow was appealing in the *Villalobos* decision, for example, there were a series of screw-ups in the files, a series of records processing failures and the like, and the CAVC has not addressed the issue as it should.

I was very critical of the Federal Circuit in the *Cole v. West* decision because of its denial to the veteran of the final order doctrine, its denial of recognition that what was occurring was essentially a preclusion of the veteran going forward.

If you were to look at this multi-billion operation in a Total Quality Management sense, you'd be appalled that appeals can recycle as much as they do, and come to a decision as infrequently as they do.

I believe a Total Quality approach would compel us to say, "Let's replace this system with something that actually functions."

I've also heard it compared to driving through some of those third world capitals in a traffic circle at 5:00 in the afternoon. The veteran gets into the traffic circle and can never quite find his way out the side street.

I urge the Federal Circuit and the other Article III courts to use their power to oversee the failings of the VA appellate adjudicative system, and to hold the VA and the appellate system in contempt, where appropriate, for not dealing with the situation.

Because Federal courts have been so effective with the Teamsters Union, with school districts, with prisons, with other problems of significant dysfunctions in service, we need, in the Article III Federal Circuit, a Frank Johnson, a John Minor Wisdom, or a Robert Mehrige, to fix the due process flaws in the system by getting up and getting involved.

It is not an answer for a judge to simply say, "Well, it's Congress's problem. I'm a judge. That's for Congress to fix."

What really occurs is at the Federal Circuit. Members of the Federal Circuit gave up substantial private practices or substantial income to go and do justice, to become Article III judges. I think when they're standing in front of the World War II veteran or the Korean War veteran, they would want to give justice.

I urge them, by applying ripeness, by applying exhaustion in a way that's much more friendly to the claimant, to focus on what the Supreme Court in the Abbott Laboratories case examined, the doctrine of hardship to the person being denied.

If the Federal Circuit tires of this constant recycle of claims, then it's appropriate for the Federal Circuit to get on the CAVC's next case and to send the message below.

I would hope someday to attend a Congressional hearing at which the Congress would ask the VA to defend the fairness of what it has done in some of these remanded claims. It may be that the government is stalling to save money because the widow of the dead veteran, like Jack Morton, will not get full past benefits.

We can understand the desire for mass efficiency, but we cannot understand the cost of the individualized sense of justice.

Yesterday, I went to the Vietnam wall. My wife convinced me it's finally time I should go and touch the wall and touch the names of the people from my unit that had died, and I did. And it felt okay. It felt very strange.

Those individual people and their descendants, their survivors, deserve the attention of a veterans system as good, as positive as the Undersecretary has told us. I don't believe that's occurring.

Now, I conclude that a comprehensive remedial strategy resulting in merger can result. But I would give five specific suggestions for those of you that are from veteran service organizations.

First, do what I've done. Tell the people on the transition team, who are now the policy staffs of the Presidential campaigns, what you think about the veterans' appeal system and what you think the reorganization of that system could do. They are the people who will appoint the new Secretary, the

new Director of OMB, the new Department Directors. They are the people who are in control of what the new Administration would do.

Secondly, the veterans' organization should tell Congress that the system now unduly prolongs the delivery of a benefit or the delivery of a decision because not all benefit claims are valid, but a decision needs to be made in less than the 745 days that it currently takes.

Tell Congress to amend the judicial review provisions and install a "hammer" instead. Say that the veteran will get their benefits if the VA had failed to act in a timely and responsible manner to get the information and get the determination.

I think Tom Andrews, in his 1995 article in the "Tommy" newsletter hit the nail on the head when he said, "It's got to be resolved. The veteran's got to get some relief, up or down, if the VA has failed to act within 30 days after an allotted time period for action."

What happens when an agency lives under that hammer? The Food and Drug Administration, and the Environmental Protection Agency, know that if there is a hammer in the legislation, they do actively meet the standard. They do meet the timeline.

If the VA bureaucracy were under a similar approach, what we heard from Mr. Johnson, which is wonderful, would have real teeth to it.

The change that's pending in H.R. 4864 before the House of Representatives does not go far enough for what I consider due process. The standard for "clear and unmistakable error" sets what I believe is too high a standard for reversal, but it requires that the regional office decision must have been fatally flawed as of the time it was made.

The CAVC test of CUE is like Stonehenge: One day a year, a little bit of light can go between the rocks, and when all the planets are aligned, you have clear and unmistakable error. That isn't the way administrative appeals should be handled.

So I tried to explain it in terms of the average 18-year old recruit. "If you are hurt, sir or madam, a specific error in handling your files that might occur at the VA system can be reviewed by the CAVC. But if a specific error occurred at the VA, the error was so bad that it was fatally flawed, the CAVC cannot change that error unless the decision of the Board was arbitrary at the time when the Board decided that there had not been a clear error." Sound confusing?

"Clear and unmistakable error" is incomprehensible to scholars of administrative law, and particularly to the constituents, the 18-year old recruits, the 68-year old veterans.

Why? The system is broken. A third option is the carrot and the stick. If you meet the timelines, if you meet the percentages of quality, you get extra money. If you don't meet them, we take the money out of the Secretary of Veterans Affairs travel budget, SES bonuses, and in-grade promotions.

Maybe a carrot and a stick. Meet a deadline, get extra money. Don't meet a deadline, get a

financial penalty.

Miracle-Gro. Remember Miracle-Gro? Money and appropriations, incentives for appropriations are the Miracle-Gro of the bureaucracy.

Fourth, if the veterans service organizations are quite upset, as some of them have been about some of the agency rules, they should go under Section 502, walk around the CAVC, and attack the rule in the Federal Circuit.

The combined veteran organizations should hire two or three temporary lawyers, and have them dig into the history underlying the VA regulations and attack.

Using the standards of the August 11th Mortgage Investors case, I'm sure there will be VA regulations which will be vulnerable to reversal under Section 502.

Use the Freedom of Information Act and the Privacy Act to get the internal e-mails of the Board of Veterans' Appeals and the CAVC staff as they consider the case. Use those statutes and find out what's really underlying those decisions.

Hold up the VA rules to the x-ray beam of the Administrative Procedure Act, the Privacy Act, and the Freedom of Information Act.

Fifth and final suggestion: The veterans' bar should call on the Federal Circuit to do more of what it did in the September 8th *Dambach* case. The veterans' bar should call on the Federal Circuit to exercise mandamus jurisdiction, set a deadline, and get a decision.

If the 1999 *Cole* decision can be rethought and reversed by the Federal Circuit, then the recycling of claims will end.

What will give justice in a particular case will vary with the facts and circumstances. What will give the perception of justice is that the person got a timely decision, and a timely set of facts were presented in a timely manner to an appropriate body, which gave a conclusion.

If non-remands, if actual decisions are "very rare," as one of the CAVC judges said, then mandamus of the Federal Circuit should change that.

And it may be purely an academic thought, but maybe the Federal Circuit needs to appoint a Special Master to do what it said was "fundamental fairness" in the *Nolan* case.

Now, ideally, the CAVC wouldn't need that kind of direction. The CAVC would have the will to mandamus the Secretary itself.

When I looked at the statistics for extraordinary writs, which you'll find in the website of the CAVC, zero, zero, zero, zero, and zero, maybe mandamus to the agency by the CAVC is the right response.

Or perhaps the Federal Circuit needs to appoint a Special Master, as has been done with the Teamsters and the school systems and state prisons and the like, because when there's recalcitrance in an agency, recalcitrance at best, by the Article III courts, by using their power, such as mandamus and Special Master.

In conclusion, if I have offended any of you personally, I apologize. This is a structural critique that I worked on with my student assistants over the summer in preparing this study. I don't mean it as a personal degradation of any of the work or dedication of the individuals in the room.

I do believe that these five optional suggestions, with the veterans' service organizations, could dramatically affect the receptivity of the new Administration to this kind of change.

Recall the comment that I made earlier about showing a visiting delegation. I would love to take the visiting delegation from those obscure countries that you saw marching into the Olympic Stadium, I'd like to take some of those countries and show them a veteran's benefits system that works with accountability, that works with consistency, that is responsible, that shows procedural fairness, and shows administrative justice.

At present, I have a sense that the system evades, that the system ignores, and the system gives lip service to the law. I would like that to be changed in a new system.

I realize it will take a while, but thank you for thinking about it, and thank you for debating it with us.

(Applause.)

MR. HIPOLIT: I'm Dick Hipolit with the Department of Veterans Affairs General Counsel's office.

I'd like to give an overview on some of the development of the Federal Circuit's jurisprudence, and also talk about a couple of issues that I think are of particular significance to the VA.

The Federal Circuits' role in veterans' benefits matters has evolved considerably since the Judicial Review Act took effect in September, 1989. The first reported decisions by the Federal Circuit started coming out in 1991. That first year, I think all the reported decisions had to do with jurisdictional issues, either the CAVC's jurisdiction or the Federal Circuit's.

Subsequently, jurisdictional issues still played a role in the decisions and were discussed and applied, but the Court tended to get more toward merits issues. However, there weren't a lot of decisions in those first years.

For the five-year period, 1992 through 1996, I believe there were only about ten reported decisions on the merits in the veterans' cases. A big change occurred in 1997. Many more decisions -- reported decisions -- started coming out, I think as a result of increased attorney involvement with the court. The attorneys were better able to identify and frame legal issues for the court's resolution.

I know in the last two years, also, there's been a great increase in the volume of decisions. From my own group's standpoint, I think our workload doubled in FY '99 before the Federal Circuit, as compared to '98. And this year, there also has been a drastic increase in our workload.

Despite the increase in the umber of cases before the Federal Circuit, there hasn't as yet been much use of the direct review authority under 38 U.S.C. Section 502, which allows the Federal Circuit to review directly certain actions of the VA. I think a lot of that has to do with Federal Circuit Rule 47.12, which says a petition for review of VA action have to be filed within 60 days of the action.

Use of Section 502 has been on the rise somewhat recently. I think the first challenge under 502 to be decided by the Federal Circuit was in the *LeFevre* case, which was decided in 1994. That involved an unsuccessful challenge to the Secretary's determination not to create presumptions of service connection for certain diseases based on herbicide exposure.

Subsequent actions under Section 502 have involved challenges to VA rule-making action, VA General Counsel opinions, and internal VA memoranda and letters.

Although settlements were reached in a couple of cases, I think the first favorable decision for a petitioner under Section 502 occurred this year in the Splane [sic] case, which overturned a portion of a General Counsel precedent opinion concerning service connection based on aggravation.

There remains to be seen whether the Splane [sic] case will encourage additional efforts to seek direct review under Section 502.

I think the trend in the Federal Circuit's recent decisions has been decidedly pro-claimant. I think since Chief Judge Robert Mayer took over that position in December 1997, there has been a more activist pro-claimant philosophy on the court.

The Federal Circuit's *Epps* decision, which has been the subject of a lot of criticism in the veteran community, came out in October '97 when Glenn Archer was still the Chief Judge.

By February of 1998, when Chief Judge Mayer was in place, the *Collaro* decision came out. And then, later that year, the *Bailey* decision was rendered. Both decisions were authored by Chief Judge Mayer, and both were very pro- claimant decisions.

More recently, the *Dambach* decision and a dissent by Judge Mayer in *Summers*, indicated that his fervor for veterans' issues has not diminished.

Also, recently, Judge Plager has authored a series of opinions, *Hensley*, *Winters* and *Nolan*, all of which are pro-claimant and critical of the CAVC's handling of veterans' matters.

The recent Federal Circuit decisions have included numerous references to the non-adversarial process for adjudication of veterans' claims, the paternalistic nature of the claim process, the uniquely pro-claimant nature of the system, or the need to maintain fairness in the adjudication of veterans' claims.

On the other hand, the Court has stated in a couple of cases that the generous spirit which suffuses the law cannot override the clear meaning of particular provisions.

The Federal Circuit has specifically disavowed any authority to rewrite statutes and regulations. Nonetheless, the Court has shown an inclination to depart from the strict terms of Statutes and regulations in order to provide fairness to claimants, particularly in order to correct what are perceived as actions by the VA which were inconsistent with the pro-claimant orientation of the system.

In *Hayre*, the Court departed from statutory and regulatory rules governing finality in order to correct what it saw as a grave violation of the VA's duty to assist in claim development.

In *Bailey*, the Court recognized that the statutory deadline for appealing a BVA decision to the CAVC could be tolled on equitable grounds. That case involved conduct by a VA employee which misled the claimant into missing a deadline.

In *Linville*, the Court extended the postmark rule to the filing of a motion for reconsideration with the Board of Veterans' Appeals for purposes of tolling the appeal period to the CAVC, although the Board's regulations did not provide a postmark rule applicable to that situation.

In *Dambach*, the Court suggested to the CAVC that it set deadlines for action on a remand. In *Hayre* and *Dambach*, the Court indicated a willingness to apply its jurisdiction expansively in order to provide relief to claimants who have been harmed by VA action.

The Federal Circuit has also shown a willingness to address issues or reach conclusions that were not directly presented to it by the parties. In *Hayre*, the Court acted on its own to create a finality exception based on grave procedural error when the issues argued to the Court in that case involved clear and unmistakable error.

In *Yates*, the Court gratuitously endorsed the BVA's clear and unmistakable error regulations in a case alleging clear and unmistakable error in a regional office decision.

In *Epps*, the Court adopted the well-grounded claim criteria established by the CAVC in *Caluza*, although the Government had argued only in support of the sequential obligation interpretation of Section 5107 regarding the duty to assist.

In contrast, in the *Haywood* case, the Court did remand a legal issue which it could have decided de novo, where it felt that the CAVC should apply its expertise to analyze the issue in the first instance.

Several Federal Circuit's decisions in recent years have had significant or potentially significant implications for VA, and I'd like to discuss a couple of those.

One case of potentially great significance is the Federal Circuit's departure from finality principles in *Hayre*.

In *Routen*, the Federal Circuit took note of the rules of finality of claims decisions in the statutes and regulations governing veterans' claims.

Nonetheless, in *Hayre*, the Court sua sponte created a new finality exception, holding that the finality of an RO decision could be vitiated by grave procedural error involving a failure of VA's duty to assist the claimant in claim development.

Specifically, the Court held that where VA made only a single request for service medical records specifically identified by the claimant and not obtained by VA, and then failed to notify the veteran of the failure to obtain the records, the resulting unappealed claim decision could not be considered final for purposes of further review and the claim would be considered to have remained open.

The scope of *Hayre*'s impact is not yet clear. Claimants' representatives have argued that any failure of the duty to assist vitiates the finality of the resulting claim decision.

Such an interpretation would potentially increase VA's workload substantially since VA would have to redevelop and readjudicate a large number of old claims.

The CAVC has taken a more limited view of the impact of *Hayre*. In the *Hurd* case, CAVC observed that the Federal Circuit in *Hayre* did not hold that all violations of the duty to assist are of such a grave nature that they would vitiate the finality of a decision.

More recently, in *Simmons*, the CAVC concluded that *Hayre* does not require that VA decisions be considered non-final due to what it characterized as a "garden variety" breach of the duty to assist. The Court found that application of the *Hayre* principle should be reserved for instances of grave procedural error that may deprive a claimant of a fair opportunity to receive entitlements.

Alternatively, the Court characterized *Hayre* as applying to cases where VA actiona would seriously impair a claimant's opportunity to be awarded benefits. In so holding, the CAVC emphasized three elements in the *Hayre* analysis which it found to be lacking in that case: one, that in *Hayre*, documents were specifically requested by the veteran; two, in *Hayre*, the VA did not give notice to the veteran that the documents that he requested had not been obtained; and, three, that that case involved service medical records which the Court found to be of considerable importance.

In a single judge decision in *Tetro*, the CAVC cited *Hayre*, finding that the finality of an RO decision was vitiated by failure of VA to obtain certain Social Security Administration records. However, the CAVC granted reconsideration in that case and held over a strong dissent by Judge Kramer that the breach of the duty to assist did not rise to the level of grave procedural error referred to in *Hayre*.

The CAVC indicated a reluctance to read *Hayre* expansively because it involved a judicially created exception to statutorily mandated rules of finality.

As yet, the Federal Circuit has not had the opportunity to review the CAVC's implementation of the *Hayre* principle.

Another area of great concern and interest to VA is the recent Federal Circuit decisions casting doubt on the CAVC's use of harmless error principles. Restriction on the use of harmless error might be of significance to VA because this may require remand of a large number of seemingly meritless cases.

Section 7261(b) of Title 38, U.S. Code, specifically directs the CAVC to take due account of the rule of prejudicial error. Nonetheless, in *Winters*, the Federal Circuit rejected the CAVC's reliance on harmless error principles.

The CAVC, in that case, had found that the BVA committed a harmless error by applying the wrong standard to a new and material evidence determination, because, assuming that there was new and material evidence, the claim was not well grounded anyway.

The Federal Circuit said that the case should have been remanded for consideration of the new and material evidence issue and that the harmless error rule could not be used to decide a matter assigned by statute for determination by VA, that is, the issue of reopening of the claim.

Shortly thereafter, in *Nolen*, the Federal Circuit stated that the harmless error rule has no application where well groundedness is at issue.

The Federal Circuit's action in these cases was apparently based, at least in part, on the conclusion that the CAVC, as an appellate body, is not authorized to make de novo factual findings, as stated in *Hensley*, and that such determinations were inherent in the harmless error determinations at issue.

Also, the Federal Circuit's displeasure with the CAVC's application of well groundedness principles may have been an issue in those cases.

In a recent single judge decision by the CAVC in *McHenry*, Judge Holdaway expressed his concern that the Federal Circuit's action in *Hensley*, *Winters* and *Nolen* has essentially prohibited the CAVC from considering the harmless error rule.

Although *Hensley* did not specifically address harmless error, Judge Holdaway reads that decision, which held that the CAVC is not authorized to make de novo findings of fact, as precluding the CAVC's use of the harmless error rule, since harmless error determinations inherently involve fact finding.

Judge Holdaway expressed concern that all the cases where any factual finding by the BVA is erroneous will now have to be remanded, thereby increasing VA's workload and lengthening delays without the prospect of any benefits being awarded to veterans.

Harmless error does not appear to be completely dead, though. The CAVC's recent decision in the Claudus Smith case is a good example of a harmless error case not involving factual determinations. In that case, the veteran claimed interest on past due benefits. The Board of Veterans' Appeals found it didn't have jurisdiction to consider that issue.

The CAVC found that the Board erred in declining to accept jurisdiction but found that the error was harmless because the veteran was not entitled to interest as a matter of law. That decision presumably would be consistent with the Federal Circuit's decisions in this area.

In a recent decision in *Summers*, the Federal Circuit affirmed a finding by the CAVC that any failure by the Board to consider a regulation which allegedly created an exception to the medical nexus requirement for well groundedness was harmless since the claim was not well grounded.

The court's reasoning is not clear since, seemingly, if the regulation did, in fact, create an exception to the medical nexus requirement, this would have a bearing on the well groundedness determination. Presumably, however, the Court meant to say that the failure of the Board to consider the regulation was harmless, since the regulation did not create an exception to the medical nexus requirement as a matter of law.

Since many harmless error issues appear to involve factual matters or application of the law to the facts of a particular case, we will be watching closely to see to what extent the CAVC may be permitted to continue to rely on the harmless error principles.

One additional area I want to just touch on briefly is the well-grounded claim/duty to assist area -- one of my colleagues will be discussing it in greater detail later -- but I wanted to comment that the trend appears to be that the Federal Circuit is sort of backing away from a strict well groundedness approach as delineated in the *Epps* case.

Several recent decisions have cast some doubt on *Epps* or else tried to ameliorate the consequences of the well-groundedness determination, particularly in *Hensley*, where, while the Court declined to revisit *Epps*, it emphasized that the well-grounded claim threshold is necessarily a uniquely low one, designed to screen out claims that are totally lacking in merit.

The Court emphasized that under *Epps*, the claim need only be plausible or capable of substantiation to be well grounded.

The Court also emphasized that medical treatise evidence could be used to meet the medical nexus requirement.

Shortly thereafter, in *Giles*, an unpublished opinion, the Court followed *Hensley*, characterizing the well-grounded claim threshold as low.

A couple of other cases. In *Schroeder*, the Court concluded that if a claim for a particular disability is well grounded under any theory, VA has the duty to assist a claimant with regard to all possible causes of the disability, even those unknown to the claimant.

In *Nolen*, the Court held that the CAVC cannot overturn a VA finding that a claim is well grounded.

Most notably, in August of this year, the Court granted a rehearing in the case of *Brock*, and indicated its willingness to take a new look at the *Epps* and *Caluza* standards. Congress may

intervene and moot that issue, however.

At this point, I'd like to turn the floor over to my colleague from the Department of Justice to get their viewpoint on the issues.

(Applause.)

MR. HUGHES: I'm Todd Hughes from the Department of Justice.

First, I have to make clear that what I say here are my own opinions, and not the division of the Department of Justice. I'm going to keep my remarks short because Dick covered a lot of what I would have to say, and I'm also going to focus my remarks more specifically on how the evolving Federal Circuit jurisprudence on veterans' benefit has impacted the Department of Justice and our litigation at the Federal Circuit.

In my capacity as an Assistant Director in the Commercial Litigation Branch, which handles all of the VA appeals to the Federal Circuit, it's become very clear to me that the amount of appeals decided by the Court on the merits and heard by the court on the merits has increased dramatically in the last couple of years.

When I first started at the Department several years ago, very few cases were argued on the merits, and almost all of them were dismissed on standard jurisdictional grounds.

I don't have any specific numbers for you, but I would guess that when I first started, maybe a handful of cases a year were heard at oral argument, and now we hear as many as ten a month on the merits. There's just been a dramatic increase by the Federal Circuit in its VA cases.

Given this increased involvement by the Federal Circuit, I want to ask and suggest answers to a couple of questions. First, why this great increase in the number of cases being heard on the merits, and how has that affected veterans' benefit law, and more specifically, what I want to talk about is how has it affected the Department of Justice.

First, for the why, I think there are two primary reasons here. The first, as Dick alluded to, is simply the aging Statute itself. We're now getting to a point where the VA and the veterans' court is issuing a number of merit decisions interpreting Statutes and regulations, who, as Dick mentioned, are bringing cases to the Federal Circuit that frame appropriate questions within their limited jurisdiction.

And I really applaud the bar for doing that because to get these decisions on the merits, to get definitive interpretations of Statutes and regulations where it's to the benefit of everybody, certainly works to the benefit of the government which has clear ideas of how to apply the Statutes and regulations, and ultimately, works to the benefit of the most important people, the veterans, who have clear notions of what they're entitled to.

I'm going to approach today the evolving of the Federal Circuit from my very limited perspective at the Department of Justice and talk about at least what I see and how it impacts on the work we

do.

In talking from this perspective, I suppose that one of my main focuses is on the Court's limited jurisdiction and whether the larger number of cases that the Court has heard on the merits has in any way impacted that limited jurisdiction, whether the Federal Circuit has loosened its standards of what's within its limited jurisdiction.

And, although given the extreme number of cases, I thought the answer would probably be "yes," to that. After reading through the ones, the merit decisions from the last couple of years, I'm actually pretty heartened by the fact that the Court really does seem to be living up to the limited jurisdiction in its standard for review and really is deciding only questions, interpreting Statutes and regulations.

And I'd like to give a couple of examples of cases where perhaps we at the Justice Department thought the Court seemed to be loosening its jurisdiction or perhaps maybe just got things wrong, or -- and where those cases have actually turned out not to be perhaps as bad as we thought.

The main case was the Bailey decision where the Court determined that equitable tolling that applied to the time for appeal -- the Board to the Court of Veterans Appeals.

I think that we fully still don't disagree with that decision. I think that Judge Bryson had a pretty good dissent. But the impact of that decision of our work in the Federal Circuit has been really negligible.

We've had a few cases discussing Bailey and arguing that the veterans' courts has misinterpreted Bailey. But, by and large, the Federal Circuit hasn't reached out to take a broader view of its jurisdiction of that equitable tolling.

In fact, in the *Linner* case recently, specifically reaffirmed the fact that the decision of whether equitable tolling would apply in a specific case was an application of law to fact, and was something that the Federal Circuit was simply not going to review.

And I'm pleased by that, recognize a distinction between the question they did have, jurisdiction over whether equitable tolling was applicable at all, and the decision they don't have jurisdiction over, and not whether equitable tolling should apply in an individual case.

I think the same kind of thing has been going on with a handful of cases involving the Equal Access to Justice Act. The Court has reached out and taken jurisdiction over a couple of cases that discussed what the proper legal interpretation of certain provisions of the Equal Access to Justice Act is.

In one case, they discussed what time period you have to look at the government's conduct in determining whether the government's position was substantially justified.

And I think we've agreed that what the appropriate time period is under the Statute is a legal question within the court's jurisdiction.

But, again, the Court has, thankfully, refused to go beyond addressing those limited and legal questions, and has reaffirmed a couple of decisions that is not going to address the substantial justification question itself, i.e., whether the government position in a particular case was substantially justified, and has properly recognized that that's a decision best left to the lower court and to the Board.

As a counter example, and Dick has discussed this case already, so I won't -- discussed it in length, but the one case that does worry me right now, in particular, is the *Hayre* decision. And I think it's very unclear to me what impact *Hayre* is going to have upon the Department of Justice's litigation at the Federal Circuit and how the Federal Circuit is going to apply that decision to the cases it hears.

Hayre is very slippery because, at least in my view, it essentially creates a whole new cause of action that's not based in any Statute or regulation. So it becomes very difficult for us at the Department of Justice to understand which questions that *Hayre* creates are within the Federal Circuit's jurisdiction and which aren't, because there are, of course, interpretations of Statutes or regulations involved in the *Hayre*'s court discussion of grave procedural error.

So I'm very interested to see, and I'm going to wait to see, what the Federal Circuit does when it gets the second generation *Hayre* cases, and how it decides to review the veterans' court's decisions about what constitutes grave procedural error.

I mean from the Justice Department's standpoint, as I'm sure most of you can guess, I think we'll probably argue whether certain facts rise to grave procedural error is a question of fact, or at least application of law in the fact that's not within the Federal Circuit's jurisdiction.

But given the kind of vagueness of what went on in *Hayre*, I'm not sure what the Federal Circuit is going to conclude.

And just as an ending note, I'd like to mention the Federal Circuit's decision in *Dambach* a little bit because, unlike Professor O'Reilly, I find that decision a little bit disturbing, and that is one instance, I think, when the Federal Circuit has not lived up to its limited jurisdiction.

Although it recognizes -- for those, the few who aren't familiar, I don't -- I can't tell you what the merits of the *Dambach* decision were, but what I'm most distressed about is that in *Dambach*, Judge Mayer, writing for the court, said, in dicta, that it was his opinion that there was enough evidence to support a claim. And although he recognized that that wasn't any of his -- that wasn't within his jurisdictional purview, he, nevertheless, said it.

And he also suggested that the Court impose -- the veterans' court impose a time limit upon remand, another thing that's clearly not within the Federal Circuit purview.

And it seems to me that blurring responsibility is a little disturbing. And I hate to see the Federal Circuit go down that line because there really doesn't seem to be any need for that kind of dicta in the Federal Circuit's opinion, and certainly not binding upon the veterans' court. It's merely suggestive, and bottom, it seems to be an attempt to influence the veterans' court to reach a certain

outcome that's solely the province of veterans' court.

So, in sum, I think, as I've said, in general, the expanding role of the Federal Circuit hasn't impacted the Department of Justice all that much. The Federal Circuit is reaching out and taking a lot more cases on the merits, but they're taking cases that are clearly within their jurisdiction and clarifying for all involved what the proper interpretation of the veterans' benefits Statutes and regulations are.

Thank you.

(Applause.)

MR. FLAGG: My name is Ron Flagg. From the introductions, it was probably pretty obvious why three out of four of us were invited to speak here today. Unfortunately, I'm the fourth.

My firm works extensively with the National Veterans Legal Services Program, and we represented Mr. Epps, frequently referred to, in an attempt to get the Supreme Court to hear the case. Unsuccessful.

And we are currently representing Mr. Brock in what, at least so far, has been a more successful attempt to get the Federal Circuit to reconsider the legal issues that were raised in *Epps*.

There have been a lot of references to the more critical approach that the Federal Circuit has been taking with respect to various issues in the last six month.

There are several things that strike me as interesting about that series of cases. One is, many of them -- most of them, even, involve the VA's duty to assist applicants for VA benefits, the well groundedness standard.

Second, and maybe somewhat surprising to at least some of you, the origins of the current interpretation of the Statute on those topics came not through the VA, but through an interpretation that the CAVC reached on its own sua sponte about ten years ago.

Moreover, despite the Federal Circuit's more recent critical approach to these interpretations, when it first looked at the CAVC's interpretation, the Federal Circuit, from my perspective, all too enthusiastically endorsed what the CAVC had done.

So with that background, I thought it would be helpful or useful to take a look at how we got to where we are today in this area with respect to recent cases.

When I told my family yesterday that I was going to be talking to a group of people late in the afternoon, and maybe five or six hours into a conference, I asked them whether I should use humor or visual aids to try to get people's attentions.

Not too surprisingly, they all said, given my sense of humor, visual aids would be better. So that's what I've attempted here.

In talking about the duty to assist, and we're really talking about an interpretation of the 1988 Act, the one thing that everybody is in agreement on, I believe, is that when Congress passed the Veterans Judicial Review Act in '88, they intended to codify existing VA practice, and this would be VA practice, maybe not going back 200 years as we've heard about at lunch, but certainly practice going back several decades.

If one looks at what the practice was with respect to assisting veteran benefit claimants, I don't see much conflict in it. That is to say, every source I've seen indicates that, prior to 1988, the VA viewed its mission as helping veteran benefit applicants with their applications really on an unlimited -- not unlimited, but unrestricted basis. There's no prerequisite to get that sort of assistance.

There are dozens and dozens of statements by the VA officials, regulations, manual provisions prior to 1988 that indicate that. I pulled out a couple of statements by the General Counsel of the VA, John Murphy, from 1983. But, again, you can find dozens more.

In 1983, Mr. Murphy said, "The bottom of the claim, VA itself becomes the garner obtaining the evidence for the resolution of the claim. VA is not able to obtain all the evidence or the other questions that arise.

"The veteran is requested to submit any additional evidence that he wants."

No indication that before the VA will start helping you, you have to prove some or all of their case.

About the same time as that statement was made, Judge Murphy, again testifying before Congress, said, "The adjudication procedures are not adversary in nature. In almost all cases, the claimant need do nothing more than file a claim. Adjudication of the claim then proceeds without the necessity of the claimant appearing at a hearing.

"The agency procures records of medical service and medical treatment cases in most claims," and so forth.

Again, and we've all seen statements like this, frankly not only before 1988, but in the last ten years.

The understanding, at least as it's been told to me, that everybody had, prior to 1988, was that the VA would assist benefit claimants, and there was no hitch to it. You didn't have to prove something before you were entitled to that sort of assistance.

The more normal statement of that policy -- this is the regulation -- VA regulation that has existed in 1988.

"At the time that the Judicial Review Act was passed, four proceedings -- proceedings before the VA are ex parte in nature. It is the obligation of the VA to assist the claimant in developing the facts pertinent to his claim, and to render a decision which grants him every benefit that can be supported

in the law, while protecting the interest of the government.

"This principle and other provisions of the Statute apply to all claims for benefits and relief, and decisions thereon within the purview of this part."

So, again, there's no suggestion in the VA's own regulation at the time of the Judicial Review Act that this is a conditional sort of thing that requires a prior showing of well groundedness or some other prerequisite.

Against this backdrop, the Judicial Review Act of '88 has passed -- this is provision Section 5107 -- that is most pertinent of this issue of the duty to assist.

There are a couple of parts of the act that are of interest simply because they are typically ignored. One is the title, "Burden of Proof." Benefit of the doubt burden of proof discovered by Section 5107A. Benefit of the doubt is discovered in Section 5107B.

Maybe things have changed since I was in law school, but my understanding of burden of proof is burden of proof is something you have to establish in order to prevail on the merits.

And if there's a burden of proof in this Statute, it's the well-groundedness standard, and somehow, the transformation of the well-groundedness standard from a ultimate burden of proof to a prerequisite, the fact that this section is supposed to be the burden of proof section has been lost.

It's worked, you know, only because it's become so important. It's worth I think reading verbatim, as well as I can read anyways. In Section 5107A is to remind ourselves, you know, how we got to where we are today.

Except as otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under the law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded in burden of proof.

The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in Section 106 of this title."

If my children had actually created this paragraph with their expertise in computers, they would have made the word, "such" light up because the word, "such," believe it or not, is the linchpin of the first instance of CAVC's interpretation of 5107A, later adopted by the Federal Circuit, VA and the Department of Justice.

The aforementioned decision anchors all, taking the word, "such" to mean that a person who submits a claim for benefits under the law administered by the Secretary has the burden of establishing a well grounded claim. That's what it says.

But it says, "such" refers only to a person who submits a claim for benefits under the law administered by the Secretary and who has fulfilled the burden of submitting evidence sufficient to

prove that they have well groundedness.

Now, that --

PROFESSOR O'REILLY: Try that in my class some time.

MR. FLAGG: So that's an interesting interpretation.

I'm going to come back to this third sentence of Section 5107A because I think that it also rancors quite infirm the interpretation that's been given to this provision, but we'll get back to that in a minute.

Now, this is what was passed in 1988. Did the VA, you know, say, "Gee, Congress has just changed the law. Our procedures are now going to be to only assist people who prove their claims or we have to render their assistance"?

No. They did not do that. This is the VA's regulation as of 1990, two years after the act.

Although it is the responsibility of any person filing a claim for a benefit administered by VA to submit evidence sufficient to justify belief in a fair and impartial line that the claim is well grounded. So the burden of the person filing to say it's a well-grounded claim.

The next was the VA shall assist the claimant in developing the facts pertinent to his or her claim. Not the VA shall assist the claimant to develop the facts and prove the case. But anybody who comes in has this burden to establish that their claim is well grounded, the VA shall assist also the claimants.

You would think the VA thought that there was an "if then" proposition here; that is, if you prove that your claim is well grounded, then we'll help you. They would have said it that way, but they didn't say it that way.

So how did we get to where we got? In 1990, the Court of Appeals for Veterans claims in the *Gilbert* case, without the government advocating this position, interpreted 5107A as requiring the establishment of a well grounded claim before the Secretary had an obligation to assist.

Now, why is that? You know, read the decision or maybe we should just leave it at that. I mean they often point to the fact that the first sentence talks about the well-grounded claim and the second sentence talks about assistance. So maybe one has to be proved before the other. So that's about as far as it's been explained.

Right after *Gilbert* was decided, the *Murphy* case was decided also in 1990. The *Murphy* case tried to explicate what the well grounded prerequisite was, and it described it in fairly general terms which could be characterized as plausibility. So it's a very low threshold for establishing the show and need to justify assistance.

And, as a result of that, the *Gilbert* and *Murphy* cases did not have enormous impact right from

the get go because the threshold was very low.

Now, in 1995, that changed. In the *Caluza* case, which I know all of you are familiar with, the court, the CAVC came up with a further development of what a well-grounded claim is, and then came up with this three-part test. We'll just remind ourselves what it is.

You had to show a medical diagnosis of the current disability, later medical evidence of a disease or injury in service, and medical evidence of a nexus between in-service injury or disease.

Now, that's the *Caluza* case, and it's worth pausing there because now what the Court of Appeals was saying is, some of the -- one of the things you have to show in order to get assistance is medical evidence of a nexus between in-service injury or disease.

Now, this is now in the Statute, in Section 5107A. This is Congress talking. Congress says, "The assistance to which a benefit claimant is entitled shall include requesting information as described in Section 5106 of this title."

Section 5106 of this title says, "VA, you can get information from other government agencies, such as the military departments, such as the medical records from a serviceman's or servicewoman's medical files."

So now, given the *Caluza* case, what we have is, in order to trigger the Secretary's ability to request information, including medical records, you have to first show that there is a medical -- there's medical evidence of a nexus between in- service injury or disease.

So you have to prove what you would -- something that would require your medical records, if you can't get your medical records, in theory, if you apply this strictly until you prove your case.

That's where things stood in 1995. After *Caluza*, obviously, the threshold, the well- groundedness threshold had gotten substantially higher. That's the posture of things when a case came to the Federal Circuit in *Epps*.

As Dick alluded to, the Federal Circuit actually had the opportunity just to review the issue of whether well groundedness was required for the duty to assist adhered, and the Federal Circuit enthusiastically went beyond just that narrow issue and adopted not only the *Murphy* and *Gilbert* interpretation of 5107A, but the *Caluza* gloss on well groundedness.

So, all of a sudden, as of *Epps*, you had well groundedness as a prerequisite and the *Caluza* -- what at least I view as a very high barrier to establishing well groundedness.

Now, all of a sudden, we flash forward to the year 2000 and really, in an extraordinary series of decisions just in the last five months, they have got five or six decisions in this area of well groundedness and duty to assist, and they've all been, from the Federal Circuit, highly critical of what the Court of Appeals had done in this area.

Although, in fairness, as this described, the Federal Circuit's fingerprints are there, as well.

Just to skip quickly over the decisions that I'm alluding to because they've been referenced several times.

We have the *Nolan* decision which says that the CAVC must accept decisions of the regional offices or the BVA. Where the VA itself has decided that a claim is well grounded, the CAVC cannot revisit the issue. And that's a significant decision.

We have the *Hensley* and *Winter* decisions, which in both of those cases, the CAVC found that there was legal error committed by the BVA. And what the Federal Circuit said was, once the CAVC determines that there's been a legal error on the well groundedness issue, the CAVC has to remand the case to the -- back to the VA so that the VA itself can develop the record on well groundedness, applying the proper legal standards.

The *Schroeder* case, also described earlier, holding that once a claimant has made out a well-grounded claim for a current disability as a result of a specific in-service occurrence, the VA is required to assist with respect to all possible in- service causes of that condition.

Lastly, the case that I mentioned, we were involved in the *Brock* case. Many of you are veterans' advocates, and since *Epps* had been, you know, pounding on the Federal Circuit's door to reconsider the *Epps* case, and I think really over the last couple of years, the Federal Circuit has developed almost a *Miranda* warning type of paragraph in every decision which says, "Sorry. A panel of this Court cannot reconsider another panel's decision, and it has to be done on *Brock*." And they would just put that in every single decision.

Apparently, they've gotten tired of that, and now the *Brock* case, they've agreed to reconsider the *Epps* and *Caluza* opinions.

So that's where we are today and, you know, in ten minutes or less, how we got there. Thank you for your attention.

(Applause.)

PROFESSOR O'REILLY: I want to make a quick comment about the *Hayre* case.

In respectful disagreement with my colleagues from the government, I filed at the request of the Paralyzed Veterans, a brief in the Federal Circuit in the *Hayre* case.

If you would go to jail for doing the thing yourself, and the Veterans Administration does it, it's a grave procedural error. The VA lied. The VA wrote Mr. Hayre a letter and said, "We've reviewed your file, and there is no evidence of your having psychiatric reviews while you were in the Marines."

In fact, they didn't review the file. They never got the file. They didn't review it, and they did, in fact, have these psychiatric results.

When, later on, he came back, asked again, they looked at the records, and sure enough, there were psychiatric results.

If *he* had done that, if he had made the false official statement, under 18 U.S.C. 1001, he'd be in Federal prison for two years. But the VA did it and got away from it.

I think what we learned from *Hayre* is that a grave procedural error is a justification for giving the person a fair opportunity at judicial review. And that's a policy disagreement about what the court's role, the Article 3 Court's role should be in enforcing fairness and due process for veterans.

MR. LUTHI: We have time for about three or four questions.

All right. Would you state your name for the court reporter?

MR. SHEETS: My name is George Sheets. Professor O'Reilly, I found your proposal to abolish the current appellate process quite intriguing. But my question -- actually, I have two questions. One dealt with your comment about the Fed Circuit being -- becoming distractive in talking about the subsumption business, okay.

And so my first question, on your proposal to abolish the current appellate process, in your view, if such a system were to be adopted, okay, what effect would it have on the supposedly paternalistic aspect of the current system?

It's supposed to be paternalistic. It's got major problems, and I don't think there's anybody in this room that would disagree with that, including me.

The second thing is, on this subsuming business --

PROFESSOR O'REILLY: All right. Could you hold that --

MR. SHEETS: Oh, sure.

PROFESSOR O'REILLY: -- while I respond to that?

MR. SHEETS: Oh, sure.

PROFESSOR O'REILLY: I've said this before to other people. If this is paternalism, we've got a real child abuse problem.

(Laughter.)

PROFESSOR O'REILLY: The agency's approach has not served in what the Civil War people might say, a paternalistic approach.

I think that the VSO's and the other people who are involved as veterans' advocates can, at the regional office level, do a better job of getting cases prepared and getting their medical examinations

and the like.

My concern is the structure of the BVA and the CAVC does not work efficiently, and it should be replaced.

I still think the work of the VARO should give full weight, full credit, to the existing presumptions that are pro-veteran.

MR. SHEETS: And the second question is, on this subsuming business, I mean there have been several decisions, Jones v. West, Donovan v. Gober, among others, and from what I recall, Jones was vacated by the Fed Circuit earlier this year, and I haven't seen anything new come down the pike on it.

Judge Caharz had took rather serious umbrage to the Fed Circuit's holding in that case. And I was wondering if you had a view or an opinion, if you will, on what might happen with Jones.

I mean, are we going to see a new version of subsuming, or is it going to go by the wayside?

PROFESSOR O'REILLY: I think it will go by the wayside. I think we're seeing in the year 2000 what the English used to call how many angels could dance on the head of a pin.

Subsumption, dealing with those bizarre relationships below, is a distraction from what really ought to be done, which is to get to a decision or get to a conclusion.

And if the veteran gets an up or down decision, then he can file another claim or then pursue a subsequent claim.

But the "hamster wheel" involved in which remand is followed by ignorant actions on the part of the lower level should be unacceptable, as well as being inappropriate in our day and age.

MALE VOICE: Just one question and a brief comment.

My question is --

PROFESSOR O'REILLY: Do you want to put on the record --

MR. McKENZIE: Oh, I'm sorry. My name is Andy McKenzie. I'm an attorney with BVA.

I want to -- you were talking about the hamster wheel and all the remands, and you didn't like that.

In your research, I'm just wondering, were you looking more at recent decisions, or were you comparing maybe some -- let's say I don't know how you can do this legally. You know, comparing what we had written say in our remands to what was actually in the file.

Is that part of what you were doing?

PROFESSOR O'REILLY: No. Obviously, I could not have access to the files under the Privacy Act since I didn't have Privacy Act releases.

What we did do is we studied the results of the CAVC decisions and those recorded decisions that we could read from the -- let's see. This would be the last three or four years of CAVC, the last five of six years of Fed Circuit.

And those are the symptoms of which we were diagnosing the problem below.

We then looked to the Office of the Inspector General of the VA, the General Accounting Office and other studies to which we could find of the work of the appellate structure.

When you put those pieces together with a comparison for what now exists in other entities, you say, "This is the least efficacious. This is the least efficient, the least fair of the five Federal disability systems."

MR. McKENZIE: Well, it just seems like if you're going to be talking about whether you should be doing opinions or not, there should be some -- you shouldn't reach a conclusion until you've looked at the file and you have -- and you asked the question, "Is this a valid action?"

In a lot of the cases -- the comment I wanted to make was that, you know, one of the cases of the veterans' service organization, depending on the strength of the case, they either put in a sort of detailed argument or sort of a boilerplate argument. But they, almost all the time, they have the paragraph there that says, "If the Board does not conclude this in the veteran's favor, it should remand the case back to the RO."

And we're just -- you know, we're just trying to deal with the veteran. We're just trying to get the veteran every opportunity if there is a valid basis for doing so.

I mean if we can't grant the claim, but there's some procedural deficiency with the file, you know, then we want to get more development. And sometimes we can do that within the VHA system where we try to do that when we can.

But if it's a question of missing records, certainly service records, then we have -- we basically are compelled to remand.

And that's why tabs is not just a hamster wheel. It's a -- you know, we're just trying to follow the law and, as you say, give it more than lip service.

PROFESSOR O'REILLY: If there's a problem below, the answer to the problem below has got to be better, naturally.

If the lunchtime presentation worked out and better management occurred, I would certainly agree with you that you would be doing fewer remands.

As the Court of Veterans Claims matures over a dozen years, I really expect that it will be

impossible for a judge of that court, in a public statement, to say, "Our actual decisions are very rare, but that most of what we do is remands."

I think it's an inappropriate reflection on that appellate court that they don't come to a decision more frequently than they do.

MR. LUTHI: In order to get us out of here and the other session started, I think we'll take one more question.

MALE VOICE: I'm going to squeeze in three comments. First, I've reviewed the Federal Circuit's reversal rate since 1994, when they first started addressing cases from the CAVC, and just quickly, in 1994, they reversed six decisions.

In 1995, there were no reversals. There were two reversals in 1996 and 1997, which was followed by six in 1998. There were two in 1999, and to date, in 2000, there have been ten. Judge Farley spoke to the NOVA seminar on Saturday and referred to this as -- I'm sorry?

PROFESSOR O'REILLY: Judge Ivers.

MALE VOICE: Oh, Judge Ivers. Excuse me. Judge Ivers. I don't want to make wrong attribution here.

-- described this as, "The times, they are a changing." And I think that that is not only a fair characterization, but a characterization that everyone involved in this process needs to begin to address.

In addressing Richard and Todd's concern about Hayre, I would like to make the observation that I believe the Federal Circuit has been inordinantly generous with both the department and with the CAVC in not saying out loud, "Due process violations and Constitutional violations."

In my view, they have purposely avoided slapping the agency and the Court for failing to address this, and in lieu, have used euphemisms such as, "grave procedural error," and "principles of fundamental fairness," which, at least in the law school that I went to, referred to those as "due process violations."

The time is changing, and the agency has to recognize its accountability. The agency has not been accountable to veterans, and what Judge O'Reilly said that I did agree with --

PROFESSOR O'REILLY: Professor O'Reilly.

MALE VOICE: Yes. I elevated you, didn't I? -- Professor O'Reilly --

PROFESSOR O'REILLY: Not necessarily.

(Laughter.)

MALE VOICE: Not likely after today. But what Professor O'Reilly said that I did agree with is that the issue here is timeliness.

What the gentleman from the Board said about remands is fine, but if they don't happen in the veteran's lifetime, they're of no value whatsoever. And if they happen six months out or 18 months out or three to five years out and there is no relief in the CAVC by the way of mandamus, then the veteran is left without a remedy, and that's not satisfactory.

PROFESSOR O'REILLY: Amen.

MR. LUTHI: Thank you very much. On behalf of the Court of Appeals, we'd like to present --

PROFESSOR O'REILLY: Isn't it symbolic we're getting paperweights?

MR. LUTHI: More paperweights, and I can assure our two Federal Government employees that they don't escape any (inaudible).

(Laughter.)

MR. LUTHI: Thank you.

(Applause.)

APPROXIMATELY 16% OF BVA DENIALS ARE APPEALED TO THE CAVC: ARE MERITORIOUS APPEALS FALLING THROUGH THE CRACKS?

Moderated by Mr. David Landers

MR. LANDERS: Ladies and gentlemen, welcome to this seminar with the rather unwieldy title: "Approximately 16 percent of BVA Denials are Appealed to the Court: Are Meritorious Appeals Falling Through the Cracks?" Materials prepared for this session may be found under Tab 4E of your notebooks.

My opening remarks are only intended to set the stage for the panel member presentations and I don't intend to just repeat verbally or by overhead projection all the material that is referenced in the tab. But I will be making references to it.

I will be followed by three distinguished speakers whom I will introduce at the end of my brief presentation. They are well- versed in the wild and wonderful world of VA law.

Unless any of the panelists gets carried away with his presentation, which did not happen this morning, fortunately, there should be ample time for audience participation at the conclusion of their remarks.

I do have a request that I should have made this morning and didn't. At the time for questions and

answers, please identify yourself for the benefit of the transcriber over here. There is going to be a permanent record made of all of this, so you'd better be careful of what you say before you open your mouth because everything you say will probably be printed for all of posterity in the next edition of the Vet.App. Reporter.

So please, if you could, no matter how difficult it may be, refrain from any questions or comments until all four of us have spoken and then we can launch into a discussion.

I would also like to issue somewhat of a disclaimer. All four of us come from different walks of life and we don't necessarily agree with one another. What do you expect out of four lawyers?

Certainly nothing which I say should be considered the official position of any entity or anybody. And I am not employed by Disabled American Veterans. But I do contract work, including case screening. Also, I spent many years in VA, both at the Board of Veterans' Appeals and the Office of General Counsel, professional Staff Group VII.

I'm not going to start off by subjecting you all to any lengthy harangue about the many pitfalls and shortcomings of the veterans benefits adjudication system under which we all operate. But I would just like to, as I said previously, highlight certain points made in my written presentation and introduce the panel.

It is perfectly obvious that the question posed by this seminar is rhetorical. You don't have to be a rocket scientist to determine that, in many instances, erroneous BVA decisions are not being appealed to the Court.

Furthermore, of those that are appealed, a rather large number which conceivably might have some substantive merit are dismissed on such procedural grounds as an untimely notice of appeal.

I worked some quick numbers up. And during FY '99, the latest stats I have available, about 22 percent of the Court's terminations were non-merits dispositions. I have excluded from this number writs because writ petitions are not actually appeals from Board decisions.

I would like to add, as an aside, that when I was a Board member signing decisions I would be presented with a draft by an attorney. I would often call the attorney in and say that the decision was really impressive until I made one terrible mistake. The attorney would start shaking and stuttering wondering what that could have been. And I'd say, "I opened the C file!"

There is a moral to this story, because a Board decision may be just the tip of the iceberg. You can't always assume, for example, that the evidence reported in that decision is always complete or is accurate.

I wonder sometimes whether the same phenomenon ever happens at the Court of Appeals for Veterans Claims where a judge is presented a draft decision by one of his clerks and the judge looks at the record on appeal and finds there is a bit of a gap there.

When a claimant receives a BVA decision, even though the product may be fatally defective, this

is not always apparent to the reader. For example, in a service connection claim, the veteran wants service connection for a back injury. The veteran knows he injured his back in service. The veteran knows that his bloody back has been hurting every since. It might just be that the veteran waited twenty years before he ever sought medical treatment. Thus, he can perhaps compare the evidence the Board reports to what he knows to be the facts of the case. But he never heard about GC opinions. He doesn't know anything about diagnostic codes, such as the fact that the one knee disability might get two separate ratings, one for instability and one for arthritis and limitation of motion. So if the Board doesn't tell him, he has no way of knowing that.

Trust me. I've screened many VA decisions and quite frankly there is not always full disclosure in those decisions in terms of either the facts or the correct legal criteria.

We all know that statistics can be very misleading. Sometimes this is unintentional and sometimes it is intentional. For any statistics to be meaningful, in my opinion, you have to know the source of those numbers and the methodology applied. That's what I tried to do in the explanation of Tab 4E.

By way of illustration, the 16 percent number that you see in the title of the seminar, in my opinion, is really a very misleading number and grossly overestimates the percentage of BVA denials appealed to the Court. And I will tell you why. It's how the BVA counts its decisions.

Each decision is counted once. Well, suppose it is a mixed disposition? Suppose one issue is granted and one issue is a remand and one issue is denied? How does the Board count it?

Well, what they do now and as they have been doing since the dawn of time, is to count it once. So which disposition counts? They have a trump sequence: allowed, remanded, denied.

Therefore, ten issues and all but one is denied. That counts as an allowance if only one is allowed. Another case, twenty issues, one is remanded, the others are denied. That counts as a remand.

I get to screen a lot of raw Board decisions. Raw means I don't initially have access to the C file. That can be pretty enlightening when I do.

I took 250 of those recent Board decisions that the Board would have counted as a grant or as a remand for statistical purposes. In 40 percent of those decisions, at least one issue was denied. Meaning there was an issue that could be appealed to the Court.

That's why I say that 16 percent number, as I explain in the written presentation how the numbers are obtained is quite misleading as to actual percentage of veterans who are appealing denials. It's actually much lower than 16 percent.

Next, I would like to briefly discuss the so-called merits error rate that is shown in the chart over a five-fiscal year period. And this can't be looked at in a vacuum. Again, I have given you the sources for the information and the protocols employed.

I recently heard a high Board of Veterans' Appeals official talk about an accuracy rate -- and

we've all heard the words accuracy rate -- between 80 and 90 percent.

I don't know what accuracy rate means. I can only speculate that perhaps it is based on the percentage of Board decisions that are successfully appealed to the Court. Maybe the Board's internal quality review procedure has something to do with it. I don't know.

In any event, there seems to be quite a disconnect between the so-called error rate of the Court and the so-called accuracy rate of the Board. If you look at those numbers, you will see that of merits dispositions during FY '99, the latest full fiscal year, two-thirds of those were bounced back to the Board on at least one issue.

In all fairness to the Board, there may have been a partial affirmance and just maybe one issue was vacated and remanded. Nonetheless, that is pretty startling when you think of the Board decisions that are appealed to the Court and make it to the merits stage, two- thirds of those are returned to the Board for some deficiency, be it reasons or bases, duty to assist, or whatever.

We all know that the Court seldom reverses the Board. It is a much more typical situation where the Court says to the Board, please try it again.

Now, I would like to introduce the panel members who will follow me to make individual presentations. As I said before, we will have time for questions and discussion after their individual presentations.

The first speaker will be Brian D. Robertson, Esquire, who is an attorney with the Paralyzed Veterans of America. Brian is the Director, Case Evaluation and Placement Component of the Veterans Consortium Pro Bono Program. In his other life, Brian was an active duty U.S. Navy Judge Advocate General Corps officer. His specialty, as his title suggests, is the screening of cases and placement of those deemed meritorious with pro bono attorneys for litigation in the Court.

Next, we have Keith D. Snyder, Esquire, an attorney in private practice who has been representing claimants before the Court since the Court began operation. He edits a newsletter, trains veterans advocates, and is one of the founding fathers and past president in an organization called National Organization of Veterans' Advocates, or NOVA for short.

You will see that Keith's biography is very short and very modest, especially for a lawyer. One thing he neglected to mention is his achievement which, as far as I know, is unique. If anyone is aware of another case, I would be happy to know about it. But he was the first, and I think only, beneficiary of a monetary sanction imposed by the Court against the Secretary of Veterans Affairs.

I know this case quite well because I had just arrived at Professional Staff Group VII. Fortunately, I was not in charge. So you could say it wasn't on my watch. Anyone who is interested in looking up that case it is *Jones v. Derwinski*, 1 Vet.App. 596, 608 (1991).

Last, but not least, on our panel is Ronald B. Abrams, Esquire, Deputy Director and Director of Training for the National Veterans Legal Services Program. That's NVLSP for short. Like yours truly, Ron is a former VA employee. He was with Compensation & Pension Service while I did my

time with BVA and Office of General Counsel.

Ron trains and does case screening. And like Keith, he is also a newsletter editor. Ron has also authored and co-authored numerous articles and publications concerning veterans benefits.

Without further ado, I would like to turn the podium over to the first speaker, Brian Robertson.

MR. ROBERTSON: Good afternoon. First of all, as I was sitting up here this morning getting ready for the first presentation of the panel, all the other folks sitting up here with me all had little tags that says "speaker." You will notice that mine says "guest." So I take that as a not too subtle hint that they want me to be very short and succinct with my comments.

What I am going to do is to go through some of the statistics -- and unfortunately, that is probably not the most exciting part of the presentations this afternoon -- to see where we got the 16 percent figure from and whether it is really accurate and perhaps what that portends for all of us.

Certainly we could say that the 16 percent figure, if that is in fact accurate, that the other 84 percent must be satisfied and that's why they went away and didn't bother to appeal. I've actually heard people say that. People in very high positions.

I'm not sure that I necessarily agree with that particular figure because if I did, then I could simply pretend to be Forest Gump and say they must be satisfied and that's all I have to say about that. And then I could sit down and we could go to somebody else's turn.

But I think there is more to it. I don't think all those veterans out there who get those adverse BVA decisions and do not come to the Court, that they are satisfied. So then we need to look and see, well, why is that the case?

First of all, I think the figure of 16 percent is pretty accurate. If you look back over the past five years you will see that it goes up and down from year to year. But when you average it out, it works out to be about 16 percent, again, with the caveat that our Chairman talked about. We're talking about total denials. Those are cases that were totally denied by the Board. Not a partial denial, but a total denial.

Another figure that I came across when I was getting ready for this presentation, I went back and read through the reports of the prior judicial conferences. I came upon a report that Bob Comeau had made in the October 1993 judicial conference -- that would have been the second judicial conference -- to the effect that, quote, "Generally, Federal Courts of Appeal receive about 9 percent of the civil cases below."

If that's a good figure -- and I don't have any reason to believe that it's not -- maybe 16 percent isn't bad after all.

Another thing that we looked at, and this took quite a bit of digging. The Chairman of the Board sat in on the morning session and I had to compliment him on his statistics because they are very easy to find and very easy to read.

These statistics, the folks in my office spent two or three weeks trying to round up the information going from two or three social security libraries as well as the internet. And then, of course, we had to figure out what all that stuff said.

At any rate, if you look back over the last four or five years, the decisions of the Social Security Appeals Council which ultimately were appealed to the District Court, it works out on an average to about 19 percent. So you have to compare that with the 9 percent that Bob Comeau gave us for his sort of general federal civil filings versus 16 percent for the Court of Appeals for Veterans' Claims and then the social security decisions.

I'm not sure that these statistics in and of themselves necessarily prove anything. But I think it gives you sort of the range or the spectrum that we are talking about.

The second part of the topic uses the phrase "meritorious appeals." I guess that phrase probably requires a little bit of definition or a little bit of thinking about because it means different things to different people.

Are we talking about, for example, a meritorious appeal being one where the Court issues a precedential decision? Or would a meritorious appeal be something where the Court simply grants relief which is favorable to the veteran in some fashion, whether that's a remand or a reversal or the case is settled in some capacity?

I think most of the folks working for or on behalf of veterans would probably opt for a more generous definition of meritorious appeals.

I also went back and took a look at some of the Court's own statistics. You have to remember that when you're looking at the Court's statistics that you are trying to compare, in some sense, apples and oranges because you have cases that are filed in one year but the ultimate meritorious decision, whether that is pro or con, may take place in a completely different year just because it takes so long for a case to progress through the Court by the time it gets through the records process and briefing and things like that.

So in some respects, you can't make direct comparisons, but that's probably the best that we can do.

I looked at the topic of error rate. I'm not doing this to pick on the Board of Veterans' Appeals, but simply to show, again, over a four- or five-year period of time the rate at which the Court made a decision which was favorable to the veteran was fairly consistent. It stayed generally in that range despite the fact that the number of appeals almost doubled during that period of time.

From that, I think it would not be unreasonable to conclude that if the error rate had remained fairly constant -- whether we are talking about 1,200 appeals or 2,400 appeals -- then that would tend to suggest there are other adverse BVA decisions out there -- and we know there are a lot of them -- that if they were to be filed in the Court they might have a similar error rate as to those that have already been filed.

The chief problem we have, of course, in talking about this subject is we don't know why the veterans choose not to file an appeal with the Court; why they simply take that adverse BVA decision and go away.

So I decided to go a step further. I sent out a very short questionnaire to national service officers around the country; the different service organizations, the state veterans' services organizations. And I asked them for their input on two brief questions.

The questions that I asked them were: Why don't more veterans appeal? And what should be done to address this fact?

I figured that they would probably be in a good position to give you some information because they are the individuals who work with the veterans on a day-to-day basis at the regional office level or at the medical facilities. And that's why I went to them.

In addition, I was also at the Paralyzed Veterans of America National Service Officer training seminar about three or four weeks ago and I had an opportunity to talk with a number of service officers there. So the information that I'm going to give you is sort of distilled in that process.

I don't want to oversell this. And I will be candid when I tell you that I didn't get a whole lot of responses back from my survey, probably a couple of dozen. So you will have to factor that in when you look at what I am about to tell you. But I think it does give you some indication as to what is going on out there in the field.

The answer to the first question, why aren't there more veterans appealing, this is what they told me sort of in a decreasing order of importance.

First off, they said the veterans are simply tired of the struggle. They have waged this battle for years and years and years and they are simply worn out, which is unfortunate because it says essentially that the VA wins by default.

I had even seen that in a case that we had seen at the Pro Bono Program that we sent out to an attorney. The attorney was on board and representing the veteran, and all of a sudden I saw an order out of the Court where the case had been voluntarily dismissed. That always catches my eye because I wonder, gee, did we miss something there when we screened that case?

I called the attorney up and the attorney said, no, the veteran was just tired. Even though he had an attorney working for him full-time and he didn't have to do anything more at the Court, he simply wanted to go home and play with his grandkids. He was just tired of being in the process.

The second thing is, they told me that veterans don't know how to file an appeal.

The third thing they told me is that they think it will cost them a lot of money.

The second question, which was what do we do about this, this is what the service officers told me.

They said that they think that veterans should get more information about filing an appeal. They should be actively encouraged to exercise their right and be provided the necessary forms to file an appeal.

In reading through some of those surveys where they annotated them for me, which they were free to do, some of them I thought gave me some fairly poignant comments.

One, they said it is a process that they, the veterans, do not understand.

Two, they, the veterans suffer total frustration. That's their word; not mine. Total frustration dealing with the VA.

And finally, veterans are told that only exceptional cases are heard at the Court.

I wanted to talk very briefly about what I think are the very obvious problem areas. Perhaps you have others that you can think of within this entire process.

I don't think any veteran, first of all, understands the transition from the VA administrative claims process to the arena of judicial review and what it takes to file an appeal, which of course you and I know couldn't be any simpler with this Court.

You take your name, your address, your phone number, and the date of your BVA decision, you put in on the back of an envelope or a piece of notebook paper, and you mail it in to the Court and you're done.

Then, of course, you have to get to the second part which is the Court wants you to pay some money. This, again, isn't that hard. You can either pay the filing fee or you can ask for a waiver of the filing fee.

I thought this was a particularly interesting statistic. Calendar year 1999, about 2,300 docketed cases, 36 appellants had their appeals dismissed because they couldn't figure out how to deal with this issue of paying the filing fee or seeking a waiver of the filing fee. I know that figure is pretty accurate because I read all 2,300 of those cases and I read all 36 of those orders dismissing them.

I think that says a lot about one very critical stage and how much veterans simply don't understand some elementary parts of the process.

Anther key part of the process, of course, is the designation of record and counterdesignation of record on appeal. I have a lot of attorneys that call me and ask me to walk them through that process. So you can imagine how it must be for a veteran trying to figure all that out.

The way we do it, as folks that are involved in this process, is to try to encourage or educate more veterans about the right of judicial review. I think that there is a lot of room for improvement across the spectrum.

Now, Keith Snyder is going to talk to you. He's got a proposal and I will let him give you that

part of it. I think that the VA itself can do more with some of the notices and some of the information that they provide.

There may not be a legal duty to do this. But nonetheless, I think they could go back and look at some of the information that they put out and see if they couldn't say it a little clearer and make it a little bit more understandable.

The service organizations. There is more that they can do. I have to be careful here because I don't want to bite the hands that feed me. Each of these folks here has a boss that they report to. I have four.

MR. SNYDER: I'm self-employed.

MR. ROBERTSON: But you're married. Right? Anyhow, I have to be careful what I say about service organizations because you can't generalize. There are a lot of them out there that provide different resources all across the spectrum.

Then again, I don't think it is unreasonable to say go back and look at what you do and what you say, what information you provide and see if you can perhaps be a little more helpful to those veterans out there who are members of your organization. After all, that's who you are there working with and who you are serving.

Should we as attorneys be more involved in helping to get the word out about the Court and about judicial review? I think the answer to that is yes. I have to ask myself the same question.

What are we doing in our hometowns to get the word out about the Court, about judicial review, and the internal process? I'm sure there is more that each of us can do.

I want to conclude with the thought that I think there is a lot of confusion out there. I want to show you a couple of slides that I picked up along the way. It has nothing to do with veterans, but I think perhaps it will illustrate to you that there is some confusion out there.

Imagine going to this storefront, Party Central, and above the place is the crisis Pregnancy Center! (Laughter.) I'm sure I would be confused trying to figure out which one I was there to see.

The other one is from a place I happened to see while I was out in Seattle one time. Going to the Future Shop, only to find out it is going out of business. (Laughter.) Thank you very much.

MR. SNYDER: Good afternoon. I have a theory as to why no more appeals get filed than they do. I think there is some evidence to support that and I would like to discuss that with you.

Those of you who write Board decisions have some sense of your obligation of how you must write your decisions. You write decisions that vary between 8 and 95 pages. Someone approached me on Saturday and said they just had a 95-page Board decision.

When you write decisions you not only recite the facts of the case, but you write decisions and you put in plenty citations to Court cases. We as lawyers, as I think probably most of us are here are, have learned to read judicial documents by glossing over those citations. When I do a quick reading of a Board decision, sometimes I just look at the last page. You then read the whole thing, but you don't read all the citations. At least I don't and I don't think you do either.

But if you are a veteran trying to make sense of what the Board has told you, trying to understand whether you still have a good case and whether you should go forward on appeal or not, you are reading a persuasively, if not bureaucratically, written document that is presenting why you should have lost.

When you read a sentence and you have five citations to cases bolded, italicized or underlined, it must be important.

You have a sense as to why you were turned down. You can glean that from the Board's decision. And you are certainly impressed with the officialness of the Board's decisions. It has all these citations to Court cases. 38 USCA, Section so and so. Or Regulation Number so and so. It looks very impressive to you the veteran.

A lot of my clients are older veterans. They are World War II veterans. They have worked for the past 40 years of their lives and they might not have had time to go to college.

I would think that, as you look at a Board decision, if anybody would pick one up and given the level of education in this room you would look at this document and you think to yourself, my God; I have at least a college education and it doesn't make any sense, the first two or three pages of this decision. It's really mind boggling.

On the other hand, you could say the Court has said we have to have discussion of the precedent cases that have come down. We have to do what the Court tells us to do. We have to address this evidence and make sure that we convince the Court that we've discussed this case. Yes. But there ought to be a way to write a little more simply, a little more plainly for our clientele.

I think that is one issue that suggests what veterans have to get through in deciding whether they are going to go forward on an appeal or not. They've not to read what you have written. They've got to read what the Board has said.

If they make their way through the Board's decision, what do they come to? When you get to the last page there is a signature. What do they have to deal with? It's just another one page.

You have the benefit of an enlarged version of this. The real version is perhaps 8- or 9-point type. It doesn't really say this is the appeal notice in bold type so that you can figure out here is what you have to do if you are dissatisfied with this decision, in bold print, top line.

No. It's just a big black bar up here. But if you look closely, it says appeal notice. And then if you read this, if you can make sense of this, you see a bunch of numbers. You think of numbers as perhaps this is the hierarchy of the importance of things I should consider doing now.

Well, what is the first thing? A motion for reconsideration? Many vets do that and the Board is quite liberal in construing communications back to the veteran after a Board denial.

They get a letter back from the veteran and it says I'm not happy with what you did. And the Board readily construes that as a motion for reconsideration and goes about the reconsideration process.

Has anybody ever had a successful reconsideration? I think it is a pretty unlikely process to succeed. But you go through it. They let us know in this first set of five sentences. They will tell you where to write to the Director of the Board to get reconsideration. Then you will see that there is no time limit on filing a motion for reconsideration.

Oh, well, I can do that. I've decided I'm going to see reconsideration. That's the first thing on this notice, so I can relax. There's no deadline. No sweat. No hurry. That's the first option.

But what if you wanted to go to Number 2. What is Number 2? Has anybody filed a CUE claim against a Board decision and been successful in this room? We heard that there was one such case.

Has anybody else filed a CUE claim against a Board decision and had any success with that? I think there was one decision in the '99 collection of BVA decisions on the CD Rom that you can find on line. Apparently it got snuck by within the first few days after the statute change.

So that's the Number 2 option. CUE. Very unlikely to work. But it still seems like it is more prominently displayed than Number 3, Appeal to the Court.

In fairness to the Board, at least in the quantity of text committed to that option, there is more there on how to appeal. But read that. What is the first thing you have to do now?

It says to you, my God, as a threshold matter, you've got to figure out whether you filed a notice of disagreement on or after November 18, 1988. Where do I find that? What is a notice of disagreement?

I have clients come to me with a Board decision that is a denial and they don't know what a NOD is or a notice of disagreement. They have no idea what it is, let alone when they did it. You just don't know.

So where do you find that out? Do you look through the Board's decision for notice of disagreement information? You can look all you want. The second page of the Board's decision might say this appeal arises out of a rating decision from the agency of original jurisdiction, dated the month and the year. It talks about a rating decision. So what? When was the notice of disagreement? It's nowhere to be found within the Board's decision. But the Board tells you in its instructions, first you've got to figure out when you filed your notice of disagreement. That's very important. It's a critical issue.

The fact of the matter it's not now these days. I have had some cases that fill part of that whole. But as a general matter, we are beyond that issue. But it is prominently displayed in that section of

this notice. So you've got to figure out where that is.

Would that be frustrating to find and figure out if you were a veteran? Put yourself in the veteran's shoes. I think it would be.

They tell you the date of mailing. You've got to go to the Court within 120 days from the date of the notice of the Board's decision. And the date of mailing is the date that appears on the face of the enclosed BVA decision.

That's a lot of words. But you could probably go back to the first page and see that rubber stamp on the front page and figure out that is the date of mailing.

But what is 120 days? It must be four months. Today is the 18th of September. That gives me until the 18th of January. Right? If you mail your notice of appeal on the 18th of January, then you get kicked out of Court. That's not 120 days.

You've got to get your calendar out and count day-by-day and then figure out whether if it lands on a Sunday, does that mean I have to file on a Friday or do I get to file on a Monday. Is Monday a federal holiday? There is no reference to that.

Well, where do I send this to? If you look closely, you will see the address of the Court. I think most people would expect addresses, as I do, to be in kind of an address block form.

You learned in your typing class in high school that you type an address to look like an address that would go on an envelope. But it's here. In fairness to the VA and to the Board, they put it there. But put yourself in the shoes of the veteran who has to make sense of this form.

Go through all of this. That's Number 3. But gee, just in case you weren't sure of whether 1, 2 or 3 is what you wanted to do, you can fall back on Number 4. You can reopen. You can't consider on the same factual basis, but it's okay. You can reopen.

There is no reference to a time limit there. They do say that, oh, by the way, look here. You can not only do 1, 2, 3, or 4, you can do a combination. You have really a blue plate special here. You can combine things.

Here they warn you that, by the way, if you are going to do a motion for reconsideration you have to do it within 120 days or else you will have lost your opportunity to appeal to the Court.

They don't put that up here on the top of the motion for reconsideration. They tell you here -- no sweat, no hurry -- there's no time limit to file a motion for reconsideration.

Again, think of your audience. Think of your veteran. How do you make sense of that?

I think it's pretty confusing. I think it's unfair to have a notice like this. And I think it is specifically written, as a matter of policy, to be confusing.

How could you design this purposely? I haven't heard any interview or any concession from the Secretary that, yes, we designed this, Snyder, just to screw up your clientele so you couldn't have cases. I haven't heard that one.

But how could you do a better job of confusing someone and discouraging them from going forward on appeal than to do this? Squeeze all this in, tiny, tight, and mush it together in such a manner that even if you are a college graduate I defy you to give this to five people on the street and have them understand what the person's choices are and ramifications are picking 1, reconsideration versus Number 3, and what really is the time line to do that?

It's tough, I think, to make sense of that. I think it's unfair. And I think it's done purposely.

Let's back up from this though. We've talked about why don't more than 16 percent of folks go up to the Court. I want to back it up and expand it and suggest to you, why don't more people go to the Board of Veterans' Appeals than they currently do?

We all know the kind of funnel shape of the adjudication process. We've got millions of decisions that are made by regional officers. We've got about 60,000 notices of disagreement that are filed.

And then you get to the Board and we have about 35 or 40,000 Board decisions that are done in a year's time. And then you have 2,500, at the bottom of the funnel, that go up to the Court.

Why aren't more Board decisions generated? Why aren't more people going beyond the Board of Veterans' Appeals?

And before I forget, my suggestion on that appeal form is that the Board's appeal ought to include a date, a date certain for filing a notice of appeal. They rubber stamp a date on the first page of the Board decision and when it was mailed. Why don't they rubber stamp on the right side of it, use the word "deadline," and then under that another date and a rubber stamp.

The left-hand stamp, the date of the decision. The right-hand stamp says "deadline" for file NOA, and here is another date. It's a two-handed operation. I think that could be done.

Date specific. Why not? Is that because it would encourage people to submit an on-time appeal? I think it would encourage people and I think it should.

To back up. Why don't more appeals get filed to the Board? Look at this. This is the letter that comes from the regional office telling the veteran, by the way, you filed a notice of disagreement, we have to give you the statement of the case.

And by the way, if you want to appeal to the Board of Veterans' Appeals, when do you appeal, how do you appeal, what do you do? Read the Form 9 very carefully.

The date? There is a date on this letter. So you have a date that you're working with. Don't forget that date.

And then where do you go to find the instructions on the VA Form 9? This is the VA Form that's sent. It's not on Page 1. Page 2 is blank. You look on Page 3 for the instructions.

In fairness to the VA, the top half of those instructions are the Privacy Act notice of how long it would take someone to fill this form out.

But if you look through this form, these are the instructions. The first thing they tell you, in fairness to the agency, they tell you go get help. That's nice. That's Number 1.

Number 2, what is this form for? Keep in mind, the cover page of this said read carefully. It doesn't say there might be a deadline, but read this form carefully. So keep reading.

Do I have to fill out this form? How long do I have? There we go. They don't use the word "deadline." But how long do you have to complete the appeal form to the Board of Veterans' Appeals?

And then they will tell you one of these things applies to you. Whichever one gives you the most time, that's what applies to you.

So you have one year from the date the local office mailed your denial. Who knows that date and where do you find it?

If you're working with somebody, they will go back and look at the statement of the case. Page 2 says recitation of evidence considered and some chronology. And there will be a date and notification to the veteran on the statement of the case.

But what if there are multiple issues, multiple statements of the case? An SSOC with a new issue that was raised during the pendency. When was the denial of that particular decision? So then when does the one-year period begin?

If you take that out, you would still have 60 days from the date on this statement of the case, on this cover letter. So you can figure that out. But read 3. It does talk a little bit about the SSOC issues.

I think that's pretty confusing. Why not make a date certain? Why doesn't this letter have a date on it?

Instead of it being on the left side, rubber stamp the right side. Your date to file your appeal to the BVA is X date. Why not, unless you purposely don't want folks to know that. I think that's a conscious decision to write such poorly designed forms.

The second reason that I think the VA does not want people to appeal, and people don't appeal any more than they do, is that our organization, the National Organization of Veterans' Advocates, had made a request for the names and addresses of Board members, individual letters who had been denied by the Board.

We thought, gee, wouldn't it be a nice service to say to those veterans, if you've been turned down by the Board of Veterans' Appeals you can appeal to the Court.

Here's a form you can use. Pre-addressed. You would have to pay for the stamp, but it is a pre-addressed form that you can send to the Court.

A simple request that relates to Title 38 benefits. It seems like it would be a nice service to offer. And oh, by the way, you can get a competent attorney if you want one. An attorney who will, on a contingency basis if nothing else, agree to represent you after they evaluate your case.

We submitted that request three years ago now and the VA denied it. We think that would be an inappropriate release and violation of privacy, FOIA, to do that.

Although there are two computer systems involved with the majority of veterans' claims. One is the C&P system that has all those who are currently on VA benefits. And that list, the persons who are already on benefits, is releasable -- their names and addresses -- to service organizations or to others -- members of Congress and others -- who want to provide information relating to Title 38 benefits. That's releasable. You can get the names and addresses of vets who are receiving Title 38 benefits.

But if you go to the other computer system -- the Board of Veterans' Appeals appellants -- no, you can't have those people because we don't have within that set of guidelines of the Privacy Act a routine use statement that would permit us to do that. So no, NOVA, National Organization of Veterans' Advocates, you can't have that.

I don't think that was just a clerk's letter drafted to tell us no thank you, invoking the narrow dictates of the Privacy Act. I think that was a conscious policy decision to not permit and encourage veterans to appeal to the Court.

Those are the two things that I would cite as bases for my theory. And oh, by the way, the VA consciously doesn't want folks to appeal.

There are a lot of other problems within the process of VA dispositions of cases separate from merit decisions and what not. But we can talk about that during the question and period in a few minutes. Thank you.

(Applause.)

MR. LANDERS: Thank you, Mr. Snyder. Next will be Ron Abrams.

MR. ABRAMS: Good afternoon, everyone. Before I start, I would just like to ask, how many people here work for either the VA or the BVA? I'd like to get a sense of the audience. (Pause.)

Okay. I think you all do a wonderful job except for what I'm going to say next. I just thought you would like to hear that.

First of all, I work for NVLSP. We screen per year thousands of cases for our clients. I agree with Keith and Brian and David. There are more people who could appeal and win at the Veterans Court than those who actually file their appeals.

In fact, there are veterans out there who should file claims who don't. There are claimants for VA benefits who should appeal to the Board of Veterans' Appeals and they don't.

Brian and Keith went over the fact that people are frustrated and they are sick and tired. I would like to add another reason to that list and that's that many people are afraid of a no.

Do you know relatives or friends who should sue Safeway or some group because they fell, were in a car accident, or their doctor messed them up? And you are the lawyer in the family and at the family party they tell you what happened.

So you say, why don't you go see a lawyer and get some money? Oh, no. I don't want to do that. It's too much hassle. It's too much trouble.

I couldn't get my relatives to do it when I thought that they should have. And trust me, I tried. So I think there are many veterans out there who just don't want to go through the actual process because it's too hard.

And then there are many who don't want to deal with the no. They think there is some secret list that is posted where Joe Veteran filed a claim, the VA told him no, and everybody will know now. They think it's embarrassing.

Although I would like to get every vet who needs one a lawyer, many veterans don't want their names out there.

So there may be another reason why the VA does not publish the names of the people who have cases before the Board. There is a privacy issue there and I don't know how that's going to be resolved.

What we've done, to find out if people should go to the Board, is quality checks nationally. We've gone to over twenty regional offices for our clients. We represent national and state service groups.

We looked at appeals taken to the Board of Veterans' Appeals and to the Court. And we found, unfortunately, that the VA still does not adjudicate many claims correctly. I'm talking about high numbers.

The Star report that Joe Thompson talked about, I think he said there was a 36 percent error rate. I'm not exactly sure, but I think that was the number. A 64 percent accuracy rate.

We found that there is over a 50 percent chance of somebody getting an erroneous decision at a regional office. Unfortunately, there is also a relatively high chance of an erroneous decision, maybe around 25 or 30 percent, at the Board of Veterans' Appeals. And there are three reasons for this.

First, many VA and BVA workers adjudicate claims quickly before all the evidence is in, before evidence is clarified, in order to get work credit.

You should understand that because the VA has to adjudicate thousands of claims, VA workers are urged to do work quickly, and hopefully, accurately. In some cases, quickly is much more important than accurately.

Secondly, there are certain types of claims that we see all the time, that the VA is having problems adjudicating. For example, it is our experience that PTSD, IU, and claims for secondary service connection are misadjudicated more often than other claims. There is a higher hit rate with those cases, when we screen them, to take them to the Court.

Also, the notices that veterans get are sometimes not only long and confusing, they are misleading. The rating Board or the regional office tells the veteran and his or her advocate, this is the reason for the denial. Then they get to the Board and they get another reason for the denial. We think that's an issue of fundamental fairness.

It would be helpful at the Board level if the Board issued a summary of a twenty-page BVA denial, an executive summary, a one or two- page thing.

Secondly, the regional offices should explain their decisions in simple language. The DRO program does that because it's face-to-face. But it has to integrate itself with the service officers who represent most veterans at the regional office now.

In our view, if you want to make this system better, all the people involved need to educate veterans that there is no stigma if they honestly think they have a fair chance of getting benefits by taking their appeal to the Court. That would help the most. But you're going to find that some people are just going to opt out of this system.

I'd like to add one other thing. I think it's a great idea if the VA could tell a veteran, you need to appeal by a date certain. But sometimes that can confuse a claimant, too, because if a veteran submits new and material evidence within the appellate period and the VA adjudicates that claim and again denies the claim, it's possible that the date to appeal to the Board can be extended past the one year from the first date to preserve the effective date. Try explaining that in a letter and you may confuse your veteran or claimant. Thank you and now I guess we are set for questions.

(Applause.)

MR. LANDERS: Thank you, Ron. I would like to reiterate. If you have a question, please identify yourself so that the transcriber can make a permanent record of this.
Feel free to throw out a question to the panel in general or to just a specific member of the panel. Do I see a hand raised in the back of the room?

MS. SMITH: My name is Cindy Smith from Truckee, California. Has anybody ever contemplated suing the Department of Veterans Affairs for violation of due process, for inadequate notice to the veterans; not at the Court of Appeals for Veterans' Claims, but at the U.S. District

Court?

MR. SNYDER: Thought about, but not been done. I understand there is some effort that has been made in other disability benefits programs to do that. Social security just passed some litigation similar to that.

Given though our peculiar jurisdiction exclusive to the Court of Veterans' Appeals, that would be a hurdle I think that would be certainly worth raising.

Or perhaps a ruling through petition asking that the Board, as well as the regional office, as a part of its notices incorporate a specific date as to a deadline.

MS. SMITH: There are many more problems with that notice than simply not including a date certain. For instance, if you look at the majority of the sentences that are included in that notice, they exceed three lines of nine-point print.

The people that are receiving that notice generally have a fifth grade reading level. A lot of them do. And the notice needs to be geared for a lower reading level than it currently is.

MR. ABRAMS: I'd like to add something to that. We went to Winston Salem where we met a veteran who was looking for Mr. Sender. Return to Sender. He brought his letter back to look for Mr. Sender.

But are you asking whether because it's nine-point type and the sentences are confusing that that's what would be the basis of your suit? Or the practical information in the letter itself is not accurate?

MS. SMITH: No. I think that the information is accurate. Unfortunately, it's so complicated that it's confusing. And that's just the result of the system and the way it's set up.

MR. ABRAMS: Understand that veteran claimants don't operate in a vacuum. They are generally represented by a network of veterans' advocates. They are lay advocates, but many of them are pretty good. They do understand the system.

So when a veteran is confused, he can go to his post, his county service officer, sometimes a state service officer, and in many instances a national service officer to get advice. Also, if there is a misleading letter there are opportunities now, based on Federal Circuit case law, to take action.

MS. SMITH: In California, I used to work for the State of California Legal Services Program and we sued the State of California for inadequate notices with regard to child support withholding because the notices did not provide sufficient information to put people on notice to what was happening with their child support.

The hurdle obviously in that case, which we successfully jumped, was to identify a property interest. That would also be a significant hurdle in a similar suit against the Department of Veterans Affairs. However, with some creative minds to the task it may be something worth doing.

MR. ABRAMS: Do you have the name of that case?

MS. SMITH: *Barnes v. the Department of Health and Human Services*.

MR. SNYDER: And you're in the Ninth Circuit Court of Appeals, the Northern District of California, which is a good forum to bring such a suit to.

MS. SMITH: Thank you.

MR. LANDERS: Are there any more questions? (Pause.) We had a more lively audience this morning. They gave us a lot of good stuff. Do I see a hand up over there?

MR. CROWLEY: John Crowley, Board of Veterans' Appeals. Before I begin, I'm pretty sure I'm the person who wrote that one case you were referring to.

The merits error rate you refer to, the 60 to 67 percent rate, does that include Board decisions that are remanded by the Court based on Court decisions that didn't exist at the time?

MR. LANDERS: Yes, it does.

MR. CROWLEY: Does it include regulations that didn't exist at the time?

MR. LANDERS: It's a strict liability test. There is no way really to differentiate. They are not all cases where EAJA would be paid, put it that way, as far as whether the Government's position was or was not substantially justified..

MR. CROWLEY: I was just hoping at some point the Court would give out statistics that would give us an indication as to where we really made a fundamental mistake as opposed to a mistake we couldn't correct at the point we wrote the decision.

MR. ABRAMS: You have a good point. But we're not blaming you for errors that you couldn't fix because the law had not changed. We're just saying that this is the actual number. But in fairness, let's cut a percentage off of that 67 percent and make it 45 percent. That's still too high.

MR. CROWLEY: But you're still certainly right to raise that. If the Court doesn't distinguish or differentiate that, I'm not sure that any of our reviews of the various decisions have a compilation that would draw that distinction between those cases where the Circuit has done something or the rules have changed that might be the case.

MR. JARVI: Ted Jarvi, Tempe, Arizona. One way to determine that would be to look at the cases where EAJA fees are awarded because that would indicate that the Department's position was not substantially justified. That doesn't happen in cases where there has been new law.

MR. LANDERS: I might add that many years ago, under the regime of the former Chairman of the Board of Veterans' Appeals, I did a survey of cases that bounced back to the Board and we tried to differentiate between fault and no fault, for lack of a better terminology, and exclude those where

the Board was completely innocent.

Say, for example, there was a change in the law or regulations or there was a precedent that post-dated the Board decision. But, the overwhelming number seemed to fall into the duty to assist or reasons or bases categories.

I just read a decision the other day that was on Persian Gulf illnesses that predated the recent Court decision that struck down one of the elements of the 4-99 OGC opinion. Actually, it was handed down maybe a couple of days before the Board decision but the Board probably had not known about it. But technically it did occur before the Board's decision.

MR. ROBERTSON: I just wanted to make an observation. I had meant to talk about this when I was speaking.

One of the questions we got from the morning session was, since you, the panel, have identified a number of suggested changes or proposals, is anybody listening or paying attention?

This morning, the Chairman of the Board was here. He did get up and speak and he did indicate that he was taking notes. So perhaps there will be something that we will see in changes in the future.

MS. COOK: My name is Barbara Cook and I'm from Cincinnati. In my perspective, in looking at all these various notices, one of the problems both with the statement of the case and the Board decision, as you were pointing out, Keith, is that they try to put every single detail of information all on one page or even on multiple pages.

So you end up with twenty pages of regulations followed by one-and-a-half pages of a summary of facts, followed by something else. And you actually get to the meat, the heart of the matter, on the last page in the last final paragraph.

So the suggestion is for the people here from the Board. But I would also like to hear some comments from the panel about the better use or more use of summaries. Summaries of the decisions, which you're really suggesting Keith, is to put a date certain, file your appeal by. And if people are worried that's not really accurate because what if this, what if that, as lawyers we all send notices to clients saying the statute of limitations is X.

But we manage to come up with one sentence that says this is the general rule, there are exceptions, talk to a lawyer. There are ways of handling that, even in the summary, that doesn't get you bogged down in every detail every time you're telling somebody what their specifics rights are. Maybe things like that can be used.

What do you all think about using sort of summary information on those cover sheets with more detail later?

MR. SNYDER: If you compared the letters of denial, they are also these days accompanied by the rating decision although not the last page of the rating decision, although not the last page of the

rating decision that gives you the diagnostic codes.

But they will give you ten or fifteen pages in the rating decision the recitation of what the regional office believes was the applicable regulations. It's the text of the regulations. Sometimes in a radiation case, for example, they will recite all fourteen or fifteen of the specific diseases that are presumptively service connected plus the 3.306 or 7 regulations in full.
Even though you're talking about a specific cancer or you're talking about a specific disability, you get a whole broadside of regulations that are thrown in.

Then if you do file your disagreement, you get the same recitation of the regulations in the statement of the case. I think it is duplicative. But certainly, as Ron has suggested, as to Board decisions maybe it would be nice to have a one-page, page-and-a-half summary of here's what we said.

Not a conclusion of law with the citations with the specific section of USCA, Section so and so, and one sentence followed by the citation. But something that is written in simple, plain English.

Maybe at the bottom of that page the summary says, oh, by the way, we're going to give you now the legalese and the full explanation of why we did what we did so that you will have a more complete and full understanding.

But at least in the first page or two you could summarize perhaps what the basic cause is for the denial. Or even, by the way, we didn't really deny you on everything. We remanded some things and that means this. And we denied and allowed this.

But even our allowance, of course, of a 10 percent rating isn't 20. So, by the way, you could appeal on that. They didn't raise that with the appeals notice. That's another failing, I think, of that notice. So simpler language used in these letters and Board decisions could be a good idea.

MR. LANDERS: I might add, one could always says lawyer heal thyself. I have read some fee agreements entered into with private attorneys which I in turn found almost incomprehensible myself.

So I think this is perhaps a failure of the whole legal profession. We try to be so precise and cover all the contingencies and you end up with all sorts of gobbledy-gook.

And speaking of gobbledy-gook. The computer has its blessings and it has its curses. I read many Board decisions that have pages and pages of text that is often totally irrelevant.

I will give you one good example. A veteran bruised his shin in service. He had a zero percent rating. He wanted a compensable rating. For lack of a better idea, they just decided to rate by analogy to a gunshot wound in that particular muscle group.

So the Board gets it and they correctly affirm the zero percent. But there are ten pages of text, going through the whole litany of rating gunshot and shell fragment wounds.

Multiple muscle groups were discussed. Through-and-through wounds and various degrees of mild, moderate, moderately severe, as well as elevation and combination were discussed, ad nauseam. It's so easy to just press a button on that computer. I see a lot of Board decisions that have pages of this.

MR. JARVI: Ted Jarvi again. My question is directed to Brian, I guess. He says he is with a veterans service organization.

It seems to me, in reviewing C files, that there is a major disconnect for those veterans who are represented by veterans service organizations at the Board of Veterans' Appeals. It seems irregular. Some of them don't represent past the regional office, but some of them do represent at the Board of Veterans' Appeals.

But I see brief after brief from the veterans service organizations that are press- the-button type briefs. They don't even mention the type of disability that the veteran has.
What I don't see at all in any of my veterans' paper work is a summary from the representative of the veteran after a BVA decision has come out.

I was wondering whether any of the veterans' service organizations make any effort to advise or to provide a summary to the veterans of what has happened to them either after they've got a regional office decision or a BVA decision.

MR. ROBERTSON: I think the answer to that may vary. You may have a better feel for that than I do, Ron.

MR. ABRAMS: Well, they invite the veteran to come call them to talk over their case. They don't give them a written summary. But most of them are available to talk to the veteran about what the Board of Veterans' Appeals or the regional offices do.

Understand that the veteran may be talking to a county service officer located in the vet's hometown. Two hundred miles away is a national service officer who works for DAV or the American Legion. Just name your group and that service officer works the case.

So they may have a network of people so the veteran doesn't have to travel. But the county service officer will try and explain what happened to the veteran.

But you're right. There is boiler plate on both side. I happened to have written some of it for the county and state people.

But just like the BVA and the RO's, people love to press that button. You can fill up pages of meaningless stuff.

It's not good when there are two sets of boiler plates, one from the veterans' advocate and one from the Board. Each one has eight pages of stuff that doesn't mean anything. So we hope that changes.

MR. LANDERS: We have time for one more quick question so we can get all of you out of here in time. The lady with her hand raised?

MS. WEST: Robin West from the Board of Veterans' Appeals. My question to the panel is, what do you charge the veteran with as to their responsibility for educating themselves? I would agree that the notice of appeal may seem confusing. But if we make it simpler so we then extend it to four pages, is the veteran going to read four pages as opposed to one page of, as you said, goobledy-gook?

There are avenues out there that the veterans can avail themselves of to get further understanding. But we are all basically charged with knowing the law, whatever it is, in any application. Where does the responsibility of the veteran lie to educate him or herself?

MR. ABRAMS: The veteran should be informed in plain English about his or her appellate rights and the issues that must be resolved. That's all that we can ask you to do.

And from the advocate's point, we should explain as much as we can to our clients in a perfect world.

MS. WEST: Right. And we are striving for the ideal.

MR. LANDERS: But it's not a perfect world. With that, I think we will wrap up. Hopefully, we have shed more light on the subject than heat. Please give our panel members a round of applause.

(Applause.)

QUALITY CONTROL OF VETERANS BENEFITS DECISIONS

Moderated by Ms. Jennifer Whittington

MS. WHITTINGTON: Unfortunately, we will not be able to run over, because we're going to have to get back for Professor Fox's representation.

I'm Jennifer Whittington. I'm an attorney with the Court's Central Legal Staff, and I will introduce the panel on Quality Control of Veterans Benefits Decisions.

First, we have Mr. Robert Epley who is the Director of VA's Compensation and Pension Service. An Army veteran, Mr. Epley joined VA as benefits counselor in 1974. He was a claims examiner and then a management analyst with the Office of Data Management and Technology. In 1986, he moved to the Nashville regional office as assistant director and then returned to the central office as the Deputy Director of C&P Service in 1988. Mr. Epley has been Director of both Detroit's and St. Louis' regional offices.

Ms. Ruth Whichard is the Chief of Systems Development Staff for the Compensation and Pension Service. She has been with VA since 1976, working in Nashville, Tennessee; Indianapolis, Indiana;

and now back in the central office in Washington, D.C. Ms. Whichard has worked as a claims examiner, a rating specialist, and quality review and training coordinator. She was the Assistant Veterans Service Center Manager in Indianapolis at the time she accepted her current position in September of 1998.

Mr. Richard Standefer is Vice Chairman of the Board of Veterans' Appeals. He served in the U.S. Army from 1967 to 1970 including a tour in Vietnam. He joined VA in 1970 as an attorney for the Board. In 1976, he was appointed to member of the Board, eventually becoming the Board's Senior Deputy Vice Chairman in 1995. He has served as Vice Chairman since December of 1997, and served as Acting Chairman for the Board from December of '97 through November of 1998.

With that, I will turn this over to the panel. We will have questions afterward, if anyone has any questions.

MR. EPLEY: And if the morning is any reflection, you will have questions. We found that to be true.

I'm Bob Epley. Good afternoon, nice to see you. Mr. Thompson, the Undersecretary, is my boss. I have told him at least a hundred times what TRIP stands for. He should know it. He does know it. It is a training initiative. It stands for training responsibility and involvement in the preparation of claims. It is intended to be a partnership between VA employees and stakeholders in the process. We can share the same information, share the same tools, and provide better service.

The other thing I need to say about the training modules, Mr. Thompson talked about a process that we have in place to put out cooperative learning in a modular format. We are working on that. We're done with the rating development and will be deploying the last of those modules very soon.

The modules for the basic position of veteran service representative will not be done until late 2002, I believe he said next year. He meant to say 2002. And with that, he pretty much gave my talk. So I'm just about done here. I was amazed. You know, I talked to Mr. Thompson this morning before he came, and I wanted to be sure we weren't going to cover the same ground. He asked me what I was going to say, I told him, and he said it. So you guys have heard a lot of what my earlier group heard in the morning. And I will try to skip over those spots and not duplicate.

Our purpose, Ruth and I, today is to give you a sense of how we run our claims operations in the Veterans Benefits Administration, give you a little overview of our structure. To the extent Mr. Thompson didn't talk about it, I'll do that, describe our skill positions in the training that we are putting out to try and upgrade our expertise. And then Ruth will give you a couple of case studies on initiatives we have where we've identified deficiencies and we're trying to build to the extent and fix it for them. And then I'll come back and talk a little bit about the STAR program that Mr. Thompson mentioned and give you a little more detail on what it involves for us and how it's changed.

How many of you work in regional offices or have been in regional offices? This is my crew. The morning crew had an awful lot of VA people in it, and I felt like I was talking to people that already had heard my spill. So I'll give you a little more detail on the structure.

The operating structure within which we process compensation claims and pension claims is state based, really. We have 57 regional offices around the country, at least one in every state. And in the last couple of years, we have reorganized them into groups that we call "Service Delivery Networks." There are nine of those. And we did that to get a better collaboration of resource use and a better collaboration of getting the work done, managing the workload and sharing ideas.

When I was a regional office director in Detroit and St. Louis, we were a lot more autonomous. I talked with my fellow directors. I went to meetings and conferences with them. But in truth, I didn't have to be mutually held accountable with them. My office did what my office did. And we tried to be the best regional office in the country. But we were not really encouraged to deal with each other the way we are now.

The onset of the Service Delivery Networks means that a group of regional offices that represents about 11 percent of the workload around the country in each one, from four regional offices up to nine regional offices, work together. And they have joint goals on what they are intending to produce. And they are held accountable jointly by the Office of Field Operations and the Deputy Undersecretary for Field Operations on their performance.

By organizing that way, we have sort of pressured them into working more closely together, discussing their workload jointly, sharing their resources, moving cases around when that's necessary, doing their recruiting a little bit differently so that we can balance out the way we do our work.

That has been a little bit of a struggle, as you might guess. It's a cultural change. Somebody who has been fairly independent in running a regional office might not have been all that keen on sharing that responsibility with anywhere from three to eight of their colleagues. But it's working. And I can tell you I'm going from here to Milwaukee tomorrow to attend a meeting of the service delivery networks representatives. We do that about every three months. And the conversations have gotten more intense. They have become more knowledgeable about the mutual issues of the day over the last two years. And it is having the intended effect of moving us into a more collaborative organization. That's what we are intending to do.

We've got the nine SDNs. At them there are about 11,700 employees in the Veterans Benefits Administration. And of that 11,700, over 6200 are directly in the C&P Divisions, which we call "Service Center Organizations." So you can tell real quickly that within the Veterans Benefits Administration, C&P is a prominent use of resources and a prominent source of the work that we have to do.

In a typical regional office today, the people who are involved in the C&P benefit line represent about two-thirds of the people at the office, and that has been growing. If I had given you a statistic on that 10 years ago, it would have been under half. But education has been regionalized. Loan guarantee has been regionalized to nine loan centers. Insurance has been nationalized to Philadelphia.

So in a typical regional office today, we got C&P. We got the Vocational Rehabilitation Program, which is usually a smaller division of 10 to 20 people and C&P, and that's it, and the support staff.

Within our organization, we're moving -- and Mr. Thompson covered it pretty well -- from a production line organization to a team-based organization. When I came into the organization as first a benefits counselor and then a claims examiner, especially the claims examiner, the work came to me in the form of case files. And I processed them to the point of making a decision, a grant or denial of benefits. Or if I couldn't do that, I developed a case. And it moved along, and I forgot about it. Someone else took care of the next step. And eventually if it needed a final decision again, it would come back to me. But I really didn't have a lot of ownership of that process.

And we are trying to change that by building the case management teams that Mr. Thompson mentioned. That has been a significant cultural change for us. But the point of it is to put more authority, more responsibility, and more accountability at the team level, give the veteran population greater access to the people who are deciding their claims, encouraging that access both ways, from the veteran into us and from us back to the veteran.

And, in fact, in case management forums that we're building, we are teaching and urging those teams to go keep the veterans apprised of the status of their claims on a regular basis by telephone and by letter and giving them the pin numbers that Mr. Thompson referred to so that ultimately they'll be able to come back right to the people and the case team that work their claim and get updated information on what's going on.

That sense of accountability has an affect on the way you do your work. And we think it's positive. We think it's the way we should be about doing our work. It should not be impersonal. And I guess the base of that is we think this is and has to remain a human process. Veterans feel deeply about their claim. They believe they are entitled, and we're trying to embed that in the way we do our work.

Those of you who have worked with us in the past will tell me we haven't done a very good job, I think. And to some extent, I agree with you. That's why we're making these kind of dramatic changes.

In the old environment, we had about a dozen positions, several clerical positions who put the claims together for us, moved it around the office, did some of the basic development work, and then several technical jobs. We are trying to constrict that.

In the case management environment, we will have a team that is largely technical, professional level people. We are diminishing the number of support staff and the number of clerical staff involved in the claims, because we want to get ownership of that process in the decision makers.

The three basis positions that we'll have in these case teams are the veterans service representative, which is a combination of the two jobs that I held, a veterans benefit counselor and a claims examiner.

The benefit counselors, when I was one, were responsible for answering phone calls, taking some inquiries and doing some background research on the cases. But then ultimately giving it to claims examiner to resolve. Clearly, a linear process and, well, a fairly impersonal process. It was a difficult thing to take phone calls from veterans not knowing the status of their claims and try to

interpret through their questions and state what the real issue was and sound intelligent.

Once again, I didn't do it all all the time. That was our goal and to offer intelligent assistance. But we couldn't do it, because we didn't have the tools. Ruth will tell you a little bit about the tools we're trying to build.

And being a claims examiner, I was able to make the award decisions that I wanted to. But I was not in direct contact with the veterans. And we're trying to build in that contact so that there be a little more compassion in the process. That's the point of what we're trying to do.

The first position is the VSR, which is the combination of those traditional functions. The second position is the rating trained VSR. It is a successor of the rating specialist. The difference being that we are asking rating VSRs to be full members in the case management team, to be in contact with the vets as well, to take their turn at handling the phone and personal contacts. And the premise of that being that the people doing the rating evaluations should not be removed from the personal process of the claim. The dealing with the individual involved making it impersonal tends to get it a little bit jaded from time to time. And we're trying to move away from that.

And the third position is the Decision review officer. Mr. Thompson mentioned that job. It is new. It is an outgrowth of a very large evaluation of our process that we did about three or four years ago called "business process reengineering."

We tested the process at 12 stations to try and see if we could, in fact, put an ombudsman in the middle of the process to offer more informal, more direct, quicker feedback on decisions and by offering that, to eliminate the need for some appeals. And when there are appeals, maybe to try and help expedite that through review of the process or the original decision.

The test was successful, and we are moving forward with that. The status of that is that we have decision review officers, I think, in 18 stations. Am I right, Bill? And we provided the first training session a few weeks back. We will have probably three more training sessions, hopefully, between now and the end of the calendar year. But if not then, very soon after so that we will be ready to put decision review officers in all the stations around the country and make that the institutional process.

So those are the positions we're trying to build into our process: fewer positions, more technicians and professional level people in the job, more ownership of the process. That's the point of what we're trying to do.

The other half of rebuilding a system is the training. And Mr. Thompson alluded to that. I won't talk too much about TRIP. We are trying to provide a more cohesive and comprehensive consistent training to our technicians.

It used to be that you came in and you got training essentially from the senior adjudicator who sat next to you. If he or she was a good senior adjudicator and had good communication skills, then you were fortunate and you got good training. If they were maybe not as sound technically or didn't have the communication and training skills, then you probably weren't going to get as good a training as your neighbor. We're trying to get away from that and build in a more consistent process. That's

what Mr. Thompson alluded to when he was talking about TPSS.

TPSS is Training and Performance Support Systems. It is a collaborative type of training, computer-assisted, where we sit three people down, provide them some training materials, written training materials, put them in front of a computer that will walk them through some processes, make sure that they understand concepts with some but much, much less direct intervention from that senior person that they used to deal with. And we're building modules that will take them through the entire process of the rating evaluation. And for the VSRs what we're working on now is the same modules for them. As you might expect, it would be more modules. The scope of work for the VSRs is broader and they need to touch on more areas.

In the interim while we're working on the formal training package for VSRs, we got a field guide out there that provides an outline of the same materials, not the depth, not the examples, not the computer-assisted instruction. But it at least gives them an outline so that they can all use it the same way and develop their people the same way through the process of becoming a VSR. It takes a while to get through all these, as you might expect. It's a two to three year process to train to be a VSR and another three years to become fully competent as a rating specialist. So we've got lot of training materials in play. We've got still a long way to go.

But our intent is that we'll have a package out there that is identical, whether you come into the organization in Los Angeles or in Togus, Maine. You'll be going through the same training. And we will indeed, as Mr. Thompson said, have a certification process in place so that you will need to take the training, test on the training, demonstrate your competency in the concepts before you can move on to the journeyman level in any of those positions.

And we think that will serve us well to try and narrow the amount of variance in our claims process. And that's what we're trying to get to here is where the decision, based on one set of facts, will be the same whether it's in LA or whether it's Maine. If you're working with us, you know we have a little bit of progress yet to be made in that regard.

So the TPSS is the foundation of the training. We are putting it together around a number of other components. When we bring in a new veterans service representative -- and we're bringing in several hundred. We're bringing in about 340 this year -- every one of them is going through an orientation process at our Baltimore training academy.

We give them two weeks of orientation to all of the product lines, all of the benefits that are available. We give them some philosophy. We give them training on the way we operate and the goals and the vision that we are trying to achieve. We provide them with the field guide or the TPSS modules that's appropriate, and then try and supplement that with several things: satellite broadcast when we have special issues that we want to deal with. We try and we have initiated and have conducted so far two workshops with mid-level technicians so that I can be directly in touch with them and my staff can be directly in touch with them on the issues of the day, and they, in fact, can hear from us directly, instead of having the policy information filtered, which is a problem in an organization of 12,000 people.

So we're using the workshops. We'll probably conduct one of those on an average of about every

nine months or so. We want to do at least three in two years as our goal. We are doing video conferencing to try and discuss with people the kind of error trends we're talking about to get the word out on special issues, satellite broadcast and video conferencing both, so that we can speak directly to the people who are working the decisions.

We've done that. We had a satellite broadcast a couple weeks ago on quality assurance, talking to the country about the trends we've got and the corrective actions that we have in place so that they cannot say they didn't have an opportunity to learn them. We have had similar satellite broadcasts on technical issues: women's reproductive issues, hepatitis, several other things. So we're doing a whole lot of things to make sure that the people in the field have better access to the kind of information they need to do their job right. And the way we see that is that's the first step in a multi-step process to build a quality organization.

And I'll ask Ruth to give you a couple of case examples where we tried to initiate corrections systemically, and then I'll talk to you a little bit about STAR.

MS. WHICHARD: As on organization, we are working really hard to improve the quality of the service that we give to our veterans, and that certainly includes the decision making process.

As Bob talks about this process, the decision, it actually starts with a claim. And the claim goes through a cycle. It's a life cycle of the claim. It goes through a series of stages. We're looking at each individual stage that claim may be in, and opportunities to improve in those particular areas which will have an outcome on the overall decision that's reached. We're also looking at areas where we can effect individual performance in areas of training, in areas of tools, and in areas of reviews.

As Bob talked about training, it is a big initiative with computer-based training, satellite broadcasts and conference calls. But that's really just the first piece. It just lays the foundation. And if you don't follow that up with providing tools to the people tools they use on a daily basis to do their jobs, then you're really falling short.

We start with a stage in the claims process which we call "the development stage." And during that stage, we identify what the veteran's contentions are, what pieces of evidence that he cited to us we are responsible to request, and what individual pieces, that we know, will fit that part of the puzzle (the service medical records and service verification, what kinds of medals that he received).

We've been criticized in the past for missing issues associated with individual claims and for really failing to fully exercise our duty to assist. So one of the two pieces, one of the applications that I want to tell you about is one that we call "MAP-D." MAP-D stands for Modern Award Processin- Development.

We have a system right now that's not very flexible. It's a benefits delivery network that we use to pay our nation's veterans, and it's really pretty reliable in generating checks. But because it's an old legacy system, it doesn't allow us to put it into modern window screens that will allow us to change the way we are doing business. So with this new application, we will create what we call an "electronic record" of the claim.

The VSR that Bob talked about, the veterans service representative, will create a claim record for each claim that's received that we'll be case managing. The VSR will enter all the contentions that the veteran raises. He'll walk it through the development stage where it will generate the request for service medical records or service verification. And then based on what information that you enter into the application, what physicians the veterans cited to have received treatment from or what hospitals, the system will automatically generate this development for it and create a tracking record. So what we're going to have is a clear snapshot of the life of that claim, the contentions that are raised, and the issues and the actions that have been taken throughout its life cycle.

We think that will help in a couple of different areas, certainly in customer satisfaction. When veterans call now, we're really dependent upon trying to get our hands on the paper claims files in order to be able to answer his questions. With this electronic claim record, we'll be able to answer questions really quickly, because it will have that full detail picture of what's happened in the claim.

In addition to that and for original disability compensation cases, we've built into it what we call an "expert system."

It's a rules-based system that will actually walk through the correct development that should take place for each of those cases, depending on the issues that are raised. Now, it's a rules based system so you build into the system the logic. And based on the questions that it asks you and the answers that the VSR enters, it tells you what's the appropriate development.

This piece has been tested in six regional offices for about six months. And the early results from that test show that this really does improve the quality of the development for this particular class of cases. When we get through this section, if we decide that we need help in the other areas of claims processing, then we'll build rules into it that will deal with issues like income or dependency.

Right now, the veterans service representatives go through a paper review of the file. Every time the diary comes up for a case, they pull that paper file, go back to the original claim, and then thumb through it to find out what the current status is.

With this quick clear snapshot, we think that not only will we be able to answer veterans questions more accurately and more quickly, but we'll also be able to do it more efficiently because we'll build diaries into it that will say when it's time to follow up to the physician who failed to send the evidence to us. So we have diaries built into the system that will automatically trigger and stay on the veterans service representative's desk that morning indicating it's time to do a follow-up for this particular case.

The system is in its final stages of development. We'll be ready to deploy this in January of 2001. We'll be able to test it in a couple of stations and be ready to send it out to the rest of the country.

I talked about the flow of the claims process or the stage that each claim goes in. If you're talking about a disability determination case, the next stage it goes to is that RVSR, that rating specialist, or rating board, or rating veterans service representative, whichever one you want to call them.

In this area, we've really been criticized for our failure to address all of the issues that a veteran

has raised, our failure to weigh all of the evidence that's in the case, and our failure to fully document the deliberative process, that deliberative thought process that a rating specialist goes through in reaching that decision.

One of Bob's top priorities during his tour in Central Office has been improving these rating decisions. And he has instituted an initiative which we call "rating redesign." Its intent is to refocus the rating specialist's attention to what's really important, to making sure that the veteran's claim, all the issues that he's raised, are dealt with in that original decision, that all of the evidence that was received is weighed appropriately, and that the final decision that's been reached is fully substantiated, that it is a quick read for the veteran and for anybody else that follows the thought process and the rationale that lead to the conclusion of that decision.

The piece that I'm involved with is a tool called "RBA 2000." And all that is is a Rating Board Automation Tool. It's a tool that allows the rating specialist to generate the written document. But what's important about this tool is that it supports the initiative that Bob started. It supports the goal of creating quality decisions because it leads the rating specialists through that thought process that should be taking place.

The rating specialist goes into the application, enters all of the contentions that the veteran raised at the time he filed his claim. The next piece of it is listing all of the evidence that was received, or requested but not received, so the physician records, the hospital report, service medical records, the complete listing of the sources of evidence that should be considered that relate to the particular claim.

The next thing is the facts. So they go through each piece of the evidence, pull out those pieces of evidence that relate to each specific issue that's involved in the case, and cite the facts that are there. Then it leads them to what we call the "rater's analysis" part. That's the part where we're doing the strengthening of the reasons for making the decision.

Build into the application are a couple of tools that we think will help. There's a visual tool and an audio tool. The rating specialist can enter the results of an examination and validate the percent that should be assigned for vision and hearing loss cases.

We have what we call a "tip master." In those cases where they should automatically consider ancillary issues, like incompetency if it's a hundred percent NP condition or where chapter 35 or auto or housing allowance are involved or special monthly compensation.

A screen comes up and it says, "Did you consider chapter 35?" And it gives them the references in 38 C.F.R. that relate specifically to the issue they should consider. And also a *Deluca* tip, one of the precedent setting cases for us. Each of the diagnostic codes associated with orthopedic conditions, give the *Deluca* tip and say, "Did you consider the provisions of *Deluca*?"

These are important pieces that we think will help improve the quality of the decisions that we're rendering. We've done training at seven stations. They are now using both rating redesign philosophy and RBA 2000. We'll be training in mid-August. We're going out this week and next week and then mid-October we'll finish up the rest of the country. So by the beginning of 2001, all

the rating specialists in the country should be using the two pieces. We are doing extensive training, both on rating redesign and RBA 2000.

We have a week-long course where we intend to go back and teach people how to weigh evidence, teach people how to organize facts, and teach people how to write, how to present their argument in an organized fashion so that it makes sense, both to the veteran and to anybody else that's reading the decision.

The same thing happens with the tool. We teach them how to use the application and how it supports the business process of rating redesign.

We think this is a total kind of an approach starting with training. Training is always the foundation. Giving tools to the people who are making the decisions, the best information technology tools that are out there, any kind of tips, any kind of knowledge couplers that Mr. Thompson talked about that will result in better quality decisions. The third piece of that would help us come full circle is to do some performance reviews or checks on ourselves to see how well our training is and how the application performs.

Well, after we finish the RBA 2000 training and the rating redesign training, we'll pull in cases from those stations and check and see if we achieved the goal that we set out to achieve. Are decisions better? Are they laid out better? Are they more persuasive in their arguments? And is it easy to find out how somebody reached their decision?

In addition to those, we have national programs, the Systematic Technical Analysis Review and SIPA for individuals. And Bob is going to tell you how we come full circle to evaluate our earlier pieces.

MR. EPLEY: Okay. I made a tactical error here a few minutes ago. I put a mint in my mouth. So excuse me. I'm going to get through this one way or the other. I thought Ruth would go a little longer. I can get this thing done a little faster.

I want to tell you some of the process checks that we have in place because we are trying to build a pretty systematic way to assure that we're improving the technical accuracy and the consistency of our product. That's what we're about. That's what we're trying to talk to you about today.

Mr. Thompson mentioned STAR. He mentioned SIPA. We also do data integrity reviews to check and make sure that we're monitoring our work, recording it properly. We do special case reviews. We do decision assessments on all of the court cases. And we put those out to the field, both in paper by way of letters, and then we put them on our web site so they're accessible to them all the time, our decision makers.

That's a problem, as you might expect, with an organization as big as ours to make sure we get the word out on time and that it's available to everybody. And it's an ongoing problem. But we're trying to work on it.

First of all, STAR. The C&P Program has had a quality assurance program in place as long as

I've worked in the VA. And they've changed several times. There have been ebbs and flows, I might say. And in the mid '90s, I would dare say that it was in an ebb period. We had a system in place. But it wasn't being executed very well.

And about three and a half years ago before I came into the job, they worked on a new process to try and look at quality from the standpoint of the veteran claimants and to identify those issues that would be critical to he or she who filed a claim. And that's how STAR was designed.

It is intended to identify those things where if we make a mistake, the veteran is going to consider the claim is misadjudicated. And I will tell you that it's a rigorous system. The people in our field offices feel like we're being real stringent on them, because it does track several areas. And to give you the broad categories, it's about a 20-question questionnaire involved. But the questions fall into a few basic areas.

Ruth mentioned identifying and adjudicating all the issues, whether they were directly claimed by the veteran or inferred because of the facts of the case. That's one of the basic categories we look at in STAR.

The second category is did we execute our duty to assist the claimant as we should? Did we give them all the information that we're required to give them? Did we tell them if we were unable to successfully adjudicate to a grant, what evidence would be needed? Did we explain the reasons and bases of the decision?

The third area is the basic decision itself. Did we correctly decide service connection? If so, did we provide the proper evaluation, 10 percent or 30 percent or whatever that is, consider all the issues at hand in that decision? And did we do the decision documentation notification to the claimant correctly and fill all of our requirements?

Those are the basic areas that we're looking for when we do our quality assurance review. And it starts at the regional offices. The regional office has to provide a sample of cases every month that they review. When they review the cases, we get notification of all the cases that have been considered by them. And we pick from those same cases. And my staff, which had nobody reviewing quality assurance cases three years ago, now has about 10 people dedicated full time to doing these case reviews. And we look at about 7,000 cases a year under the STAR program.

Every case we've looked at has been reviewed by the local Quality Assurance Program. And we do monitor the reliability, how closely our calls are with theirs.

Ideally, of course, we would like to be at the point where if we found an error in headquarters, it had already been identified and resolved at the local level. That is not yet the case. We're at about an 85 percent reliability rate, so that 85 percent of the time when we find an error, it has already been identified on the case by the local reviewer.

So we pull the cases in from them. My staff reviews them, kicks them back. As you might expect, from time to time, the regional offices either don't understand or don't like the decision we made, if we called an error on them. And we have a process that allows for their reconsideration.

They have to prepare a formal request for reconsideration, send in to the office. And the staff reviews it again. But we make sure that those cases come to me for my signature so that we're not just rubber stamping our earlier decision. And that's one of my checks on my staff, to make sure that we don't get too tight.

So far, we've been doing this for a year and a half or so. We have about 120 cases for request for or reconsideration out of in excess of probably 10,000 cases that we've reviewed so far.

So not a lot of them are being reconsidered. I conclude from that that the regional offices either happily or grudgingly conclude that we're doing a fair review of their claims or they might just say it's not worth sending it in to Epley anyway because they'll never give us an overturn.

That's what they do to you, right?

But we do have the process in place so that we can get the reconsideration of those cases.

The error rates that we have found so far in our STAR program had been publicized pretty well. I believe Mr. Thompson said it's about 66 percent accuracy overall. Let me explain that a little bit differently.

The current rate is 65 percent. If you look at it from the standpoint of zero defects. And by that, I mean we call up an error on case, if we make a mistake in any of the items. On considering all issues, our accuracy rate is 90 percent. On fulfilling our duty to assist, our accuracy is 94 percent. On reaching an accurate decision on service connection and evaluation, it's 93 percent. And on decision documentation and notification, it's 84 percent, which is far lower than the others and too low, indeed, when you add up all those errors and consider that any one of those errors on any one case makes it wrong. We have an overall zero defects rate of 35 percent and 65 percent accuracy. That's the way we compute our claims.

It is rigorous. It's lower than we wish it were. But that's that point. We know we have to work on this area. And Ruth said it right. It has been my top priority since we came in is to put this system in place, add rigor to the process, and make sure that our people know we're serious about it, give them the tools to do it right, give them the training to do it right, and get it fixed.

And the SIPA initiative, we'll put out between this coming year and the next about 354 additional decision makers to do the quality reviews of each decision maker. By that time, we hope to be in a position where we can do a hundred reviews on every decision maker in the system and evaluate them individually to make sure that they're meeting. They're not the outlier of their station. They're meeting the requirements of their job. We know we need to get that level of accountability into process.

The third thing I mentioned is data integrity reviews. And we have been doing this for a couple of years now to check the statistics in our system and do computer checks to make sure that we are tracking our cases correctly, documenting them correctly, reporting them correctly so that we have the right information in headquarters to know what our business needs are and that we know that we're going about preparing the business the right way.

We can't have any validity to any of our processes, if we don't trust the numbers. So that's what we're trying to do with the data integrity reviews. And we are building in new internal controls or we'll do computer checks to make sure that we are competent that we have the right payees, that we're not at risk for mispayment or fraud and make sure that our system has integrity overall.

By an example, currently in the process in our database, we pay over two million claims a year. We've got 3.3 million vets on compensation rolls. We have over 8,000 beneficiaries in the system who are shown to be over a hundred years old. And that may be true. I don't think so. But it's probable that many of these are people whose birth date was put into the system wrong. I hope it doesn't mean that they were mispaying those vets. But that's the kind of check that we're instituting. And we'll pull those cases and make sure that the data is correct and it is a correct beneficiary. Those are the kind of systems that we're trying to put in place to improve the integrity.

We also do special case reviews. In my office on a recurring basis, we pick the subjects that are the most sensitive of the day. We just finished a review of cases on PTSD. We have done one just before that on well-grounded claims, which I'm sure you're all aware is a sensitive topic for us, one that has given us a hard time and we're trying to get better at. And we recently did one on hepatitis C. That may, in fact, had been the last one that we did.

Hepatitis C is a, you know, condition that wasn't even understood 20 years ago. We have a lot of veterans out there who have it. A lot of veterans in the medical system who are being tested with it now. And our claim system has not handled them very well. In fact, we didn't have diagnostic codes in our rating system until very recently, specific to hepatitis C. So those are the kinds of subjects that we look at in special case reviews.

The next one we're intending to do is to look at POWs and make sure that we're giving them all the compassion consideration that we should for their conditions, especially the presumptive conditions. And we're a little bit concerned that maybe there are conditions out there that deserve consideration for presumption.

So what we've got and the last thing that I want to mention is that we also have a staff in my office who does assessments of all of the court cases that are issued, court decisions that are issued. When those decision are issued by the court, we do an analysis, provide a written summary, and make sure that those are sent out to the field. And they're also put on our web site in the new form, sequentially and by subjects so that our decision makers in the field offices have access to them.

And I won't tell you that every one of them reads it. That's the problem. We got to make sure that we get that information out to them. But we also have to make sure that they don't just see that it's out there, that they read them and they read them timely, because that is one of the things that has troubled us over the last few years. The court will issue decisions, and we don't get the word out universally in time to change the way we do our business. That's what we're striving to do. And that's why we're putting in these systems.

So I guess what I will tell you is we are in the process of building what I consider a comprehensive feedback mechanism so that we know our quality. We know where we're making mistakes. We have processes in place to fix it. I will not say to you today that it's fixed.

And if you had listened in on the first session, you'd have heard some of the complaints that are typical to us. We do make mistakes. That's why we're building these systems. And we believe we're on track to make it a bit better. It's going to take time. It's going to take a lot of effort. So with that, we turn it over to Dick.

MR. STANDEFER: Thanks, Bob. And speaking of this morning's session, gee, I have nothing to add to that. Besides as I look out over the audience, maybe about 40 percent of our participants out there are BVA people. That's very comforting. What is particularly comforting, though, is the constitution of this front row. Michelle Kane is on my staff, but where she is sitting, this morning there was a private practitioner who was on the edge of her seat, ready to pounce on us during the Q&A, and she did.

But I've got to say this, Bill. Bill works with Ruth and Bob. And what an act of loyalty and support. Bill has learned to do something that all of us learned to do in law school, and that is not only to sleep with his eyes open, but to sleep with an interested look on his face. An academy award to you, Bill.

I would go on with another personal note, and that is as of June of this year, I completed 30 years with the Board of Veterans' Appeals. And about 18 of those years-- you will ask am I bragging or complaining; a little of both--Eighteen of those years, I was involved either indirectly or directly with quality control. I've learned two things from that experience. After that 30 years, I know for a fact, boy, are they ever sick of me at BVA. But beyond that, I have learned that lawyers are not fond of criticism.

Now, that old saw they gave us when we were in law school that used to go something like this: Once you get in a legal profession, it will be like this. Every day you'll get up to go shave, and you'll look in the mirror. And while you're shaving be assured there will be some other guy somewhere who also will be shaving -- and I say "guy" because mainly it was male dominated when I was in law school -- but that other person who's shaving will have one role in life that day, and that is to tell you you're wrong.

Now, the point of that story, I think, is if you're going to be a lawyer, you better develop a tough hide. And it will go a whole lot better if you don't take any of this personally. Well, that just does not translate itself into the quality review process at the Board, I have found through the years.

Anyway, let me give you -- because you better understand how we do quality review at the Board today, if you understand historically how we've done it. I think that's of some use to you. I'll be very brief, because, you know, many of those 70 years of BVA history, we haven't done any quality control. And I think maybe that would be some of the reasons that we have judicial review today.

Before World War II, for example, I don't know how we did quality review, and I really don't care. And I don't think any of you all need to concern yourselves about it either. After World War II, and this is oral history, when I came with the Board in 1970, this is what some of the old-timers told me about how they did quality control back during those early days after World War II.

It was left strictly to the chief member of one of those three member panels who used to do the

decisions. I suspect that probably very little was done by way of quality control in those years, because as you know after World War II and even into the early 1950s after the Korean Conflict or while the Korean Conflict was raging, the VA and the Board of Veterans' Appeals both were overwhelmed with work. And if you've seen any of those decisions, circa late 1940s, early '50s, sometimes they would resolve an appeal in three-quarters of a page. Typically, it would be two pages. And a really expansive BVA decision would be three pages.

I'd submit to you that the way it was done then, although a cogent effort was made to articulate some simple denial or allowance theory, but I would submit to you that this was the moral equivalent of sending the claimant a penny postcard, saying either yes, no, or in the case of remand maybe.

Well, anyway things improved a little bit in the late 1950s and early 1960s. Again, I am told the quality review was done by a quality control committee. And you had various members who rotated on and off that committee. It was sort of a "gotcha" system. They did random sampling of completed BVA decisions after they were promulgated and then the critique started. And as you might guess there was much acrimony, so much acrimony indeed that that system was abandoned in the early 1960s, I am told.

Anyway, we didn't do quality review again at all at the Board of Veterans' Appeals until about 1978. And in 1978, a Deputy Vice Chairman was appointed to principally administer the quality control system.

Again, it was a random sampling type thing. Results were tabulated. And even though our Board members were not evaluated in any way, form, or fashion, just to critique their completed decisions was a very acrimonious process.

In 1982, I became one of two deputy vice chairmen at the board. And our principal responsibility was quality review. And I assure you that the process improved immeasurably at that time. Not really. It did change, though. And this is the way it changed.

By 1982, by law, we had to do indexes of completed BVA decisions. And we had to do a little headnote that went with the index. And we tried to do that process through paralegals or other administrative people. But the job was just beyond their capabilities. So we had to take six or eight of our younger attorneys and assign them down to the Quality Review and Indexing Section. Many of them despised it. They thought the assignment was beneath them, punitive and so forth.

Anyway, we thought, let's couple this indexing process with the quality control process and then at least we can claim to the outside world that a hundred percent of BVA decisions were subject to quality control.

Now, we know this for sure. If you're going to do a pure random sampling, you have to do it by computer. Let me suggest another way you can do random sampling. By indifference or inexpertise of the people who are doing quality control process, and I'm quipping when I say this. But pretty much that's the way it worked out when we coupled the indexing and quality control processes at the Board in the 1980s

We needed a statistically significant sampling, and we just weren't getting it in terms of what our indexers referred to the GS-14 senior quality review attorneys. So at the end of the period, we generally would just have to take a big excoursement of decisions and give them to the GS-14s who then would do a more in depth quality review.

Well, anyway in 1988, three significant events happened. The Veterans' Administration became the Department of Veterans Affairs. We got judicial review of BVA decisions. And for the first time in the history of the Board of Veterans' Appeals, our Board members were subject to annual performance valuation and had to stand for recertification in order to retain their Board memberships.

That, of course, lead to an evolvement of our quality review process. And here's how we do it today. It really has three main elements. One prong would be operated out of the Office of the Senior Deputy Vice Chairman. And he and his staff do a monthly sampling, which is statistically significant. I would emphasize the review is done before the decisions hit the street. So errors that are detected can be corrected. We use a standard protocol.

Another element would be, and some of you know that the Board is divided into four decision teams. It's the four decision teams that promulgate the decisions. Each of those four decision teams has two chief members. That's eight people total. They're integrally involved in the quality control process. And they, again, look at a sampling of decisions before they hit the street where errors can be corrected. Again, I would emphasize it is statistically significant and a standard protocol is used.

I also am personally involved in the process. I personally rule on all motions for reconsideration. I take the claims folder, I look at the decision against the claims folder. And I look at the motion for reconsideration, and I use the same standard protocol to do quality review of each one of those decisions. And I get about a thousand motions for reconsideration, 1000 to 1200 a year.

What about the protocol? Nothing remarkable about it at all. Our six elements that we look at in terms of protocol come from seminal decisions of the Veterans Court telling us what an acceptable Board of Veterans' Appeals decisions should look like: we review issues, findings of fact, conclusions of law, reasons and bases, due process matters. And finally, and this is very important, format matters.

What are the consequences? Well, we take names, and there are consequences as we do our tabulation of our quality review database. I have already said that for the first time since 1988, indeed, for the first time in the history of the Board, our Board members are evaluated in terms of timeliness of decisions and in terms of quality of decisions.

This evaluation is an integral part of the recertification process. The recertification process is basically this. The chairman sits on a panel with two other Board members on a rotating basis. Basically, it is peer review. But don't think the process is without teeth.

Through the years, we have had several members who have been conditionally recertified, and we even had one member who was decertified. That had to come, of course, from the Secretary of Veterans Affairs with respect to that. But I just want to assure you that even your friends and

neighbors and colleagues will, so to speak, pull the trigger if they have to.

We tailor our training based on what we come up with in terms of our quality review database.

I should leave well enough alone, but that's no fun. Even though a transcript of this is being made, and because we have so many BVA people here, I'm not sure this question is going to come from a private practitioner. Let me pose it.

The Board of Veterans' Appeals by the end of this fiscal year will promulgate about 34,000 decisions. And we do know from what Bob Comeau told us this morning, about six percent of those decisions will be appealed to the Veterans Court. Now, we all know this. Many of those six percent of Notices of Appeals that are taken will fall by the wayside because somebody has not paid the $50 filing fee or has some kind of defect in their pleadings. So a much smaller percentage of that six percent will actually come to issue, I believe they call it, before a judge.

Well, at the end of that process, the Board is going to get back approximately 1,000 decisions that are rejected by the Court.

Now, I have heard Chief Judge Nebeker publicly and privately say, any spin you want to put on that, that BVA's reject rate is an error rate. And I won't quibble with that at all.

But I mean, as a manager, why do I not take a "paths of glory" position on that and why don't, you know, as a matter of the quality control process, why don't we fire some Board members because of that? I mean, we know who is responsible for those thousand decisions. I've been responsible for a few of them in my own right. But I mean, let's lay that aside.

Here's why we don't. I've been here 30 years now -- don't hear me wrong in this -- and I have had either a small or sometimes a major fuss with each and every one of our Board members. I love them all. But certainly we have had our disagreements. Believe me, it would give me the greatest pleasure in the world to fire any of them. And that would be a good enough pretext. I mean, I'm not picky.

But fortunately, federal personnel rules protect our Board members from people like me who have a vindictive nature. And here's why. I've already said that about a thousand cases of the Board, a thousand decisions are going to be rejected. Well, we've got 55 Board members. And they do between 600 and 1200 decisions a year.

Well, if you do a little quick math in your head, obviously, you do not have a statistically significant sampling to take any kind of action against a Board member. And the one thing I have learned in my many years as a manager, never threaten anybody with something you don't have the power to follow through on. I couldn't win a case at the Merit Systems Protection Board based on those statistics.

Now, since a transcript of this is being made, we will let the record reflect that my tongue is in my cheek all the way out to here, and I'm holding my arm out about as far as my hand will extend from my shoulder.

Let me say this, and I mean this with utter sincerity, I'm real proud of our Board members. I think they do a great job, and I think they do it often under very, very difficult circumstances.

This also is true. We have finite resources at the Board of Veterans' Appeals. And the duty of our managers is to make a cut between quality and quantity or timeliness as to how those resources are to be divided. Believe me, all my predecessors have been criticized about how that cut had been made. I have been criticized about it. And any who come after me will be criticized. And that's how I sleep at night.

And finally, let me just say this: That's my story, and I'm sticking to it. Thank you very much.

MS. WHITTINGTON: Are there any questions for the panel?

And for the transcript, if you could just state your name and spell your last name.

MR. KARRER: Steve Karrer, K-A-R-R-E-R. I'm an attorney with Carpenter, Chartered, Topeka, Kansas. And I was just wondering oftentimes we deal with anywhere from probably 20 to 30 different regional offices in a year. And yet oftentimes, even though they're different states, different regions even, we get decisions in which the exact same language is used, especially in issues such as TDIU under 4.16(b) or combat status. And I'm wondering are you doing anything or what steps are being taken to take that evidence or language macro out of the computer system, because it's clear that it's word-for-word the same from each regional office?

And also as to statements of the case, in situations, we often get where it's just simply a carbon of ratings and decisions or statement of the case put on the heading. Of course, no steps, no addressing of the issues raised in the Notice of Disagreement. And that makes it very difficult to do an appeal that has any direction when it finally gets to the Board. And I'm just wondering if there's any specific, if you view that as a problem and also is there any specific plans to correct it?

A PARTICIPANT: A complaint with misspelling is the same.

MR. EPLEY: Well, if you're going to copy, you might as well copy it all the way.

We put out sample letters and sample paragraphs, option paragraphs for a lot of our work. And I think that's what you're referring to. Unfortunately, they're often transmitted and then entered into the computer at the local levels.

I would suggest to you, I hope, that the letters and the paragraphs that we put out at headquarters are technically correct when issued. It all is in the application of the individual case. If you use the wrong paragraph or if you go in and adapt it in any way, you can make it sound silly. And I think that that's what you're referring to as much as anything else.

We are working on that process, in a couple of different ways. We have an initiative ongoing called "Reader-Focused Writing," which is a new way to deliver written communication so that it's more understandable.

Some of you would say that our letters, are ratings, our statements of the case are sometimes obfuscating, that we hide behind the law and don't get to the direct answer. Some of you might say that.

To the extent that you might be right, we're trying to be more direct in how we do it. What is the purpose of this letter? What are we going to tell you? What do we need from you? That type of heading. And then get right to it.

The rating redesign that Ruth referred to is an attempt to put the rating decisions in that context. My disappointment with the rating decision documents and the statements of the case that we put out now is that they are done too much by rote. And we rely too heavily on canned paragraphs that maybe only are 80 percent on all fours of the case.

And I want my rating folks to get away from that and customize to the individual case, the individual fact patterns. And that's what we're trying to build into the process with the tool that she described. We will provide the reasons and bases up front, the decision even more up front.

The first thing you'll get, how did we decide the case. We granted this. We granted this. We denied this. Why? Here's why. And they will be expected to customize that language. There won't be any canned language to allow for the reasons and bases.

The reason for that is if we allow it to be canned language, that's all you get. And it is only a hundred percent accurate in one percent of the cases, when you do it that way. So we're trying to encourage them to get back to the weighing of the evidence, a fair description of how we got to the decision. And if they don't write it, there will be a blank space in the rating decision. It will be clear to you and me both that they didn't take a whole lot of time on that rating. So we are trying to get to that.

MS. WHICHARD: We did take a lot of what you call its "system-generated text" -- that's the paragraphs that you see constantly, the same thing. We took a lot of that out of this current version of the application.

As Bob said, the section that says rater's analysis is blank. It provides nothing for you at all. So the canned text that you'll see are basic ways that you establish service connection or basic things that give you a 10 percent for a certain disability evaluation associated with the diagnostic code, because they come straight from the rating schedule, and they are regulatory. But as far as the analysis of the individual case, it's just a blank screen for them to fill out.

MR. POTTER: Marshall Potter, private practitioner. This concerns the remands order about expeditious handling, either from the Court or from the BVA to the Court here.

The decision always include, This case will be handled expeditiously after it's gone up even through the Court or the BVA. And you get it back down there, and there's no, in my experiences, there's been no effort to make an expeditious handling of these cases.

What my question is, is there any way or is there any process that would allow for supervision of

the regional -- and this is primary at the regional office.

Is there any process that can be put in place that will give an oversee position or an oversee that these RO's will handle these things expeditiously, or just put them in a system and sit? For example, every time they go back, you get this thing, well, they're in a lock file. And they will sit there and sit there until hell freezes over, really.

MR. EPLEY: Yeah. We track the regional office performance by what we call a "balance score card." And explaining our organization, the Deputy Undersecretary for Field Operations is responsible for the regional offices. But we work with them on things like this.

The timeliness of processing appeals is one of the key measures on their score card for performance. It's too high, absolutely too high. I believe that the current average time to process an appeal, including my time, Dick's time, all the time that it's sitting, is about 700 days. Now, that's for remands and nonremand cases as well.

When I came in, we had almost 10,000 pending remands that were over two years old. Now, Mr. Knapp and his staff have taken a look at those, and they've knocked them down to under 500. I'm not claiming this is a success. What I'm trying to demonstrate, they are tracking those cases. They are talking to those regional offices on a very regular basis. I know that Mr. Knapp and his staff have talked to every regional office who has an appeal over a year old at least once, and if not once, two or three or four times until they get it going. So they're trying to put increased emphasis on moving those cases along. I know we have a ways to go. But we're waling of that.

MR. POTTER: What's particularly frustrating is when you will call the regional office, you'll hear about three or four so-called reasons: We're overworked, we're understaffed, we don't have time --

MR. EPLEY: No excuse.

MR. POTTER: -- I mean if you get a reply. I mean, that's either a telephone call or in a letter.

MR. EPLEY: The reason that we put the appeal time on the score card was because for a long time it was not one of the measures that was routinely tracked in regional office performance. And the result of that is an attitude where people thought that's not part of our core work -- excuse me, Dick. Sorry to say that -- but we want it to be a part of their core work. We want to make sure they understand.

MR. POTTER: On one particular case, I got a little sick and tired of it. I filed a mandamus. And five days after, that case was adjudicated, and that five days included a weekends.

MR. EPLEY: It should never be that way. I understand your frustration.

MS. KANE: Mr. Epley, I just have a quick follow-up question on that. Those cases that are coming back to the regional offices from the Board or from the Court, are they somehow tracked differently? Are they put onto a different course of adjudication? Are they just going back in the lump with everything else?

MR. EPLEY: We track all the remands. We do have a record of what they are. And as I said, Mr. Knapp's staff tries to follow up on it.

We have a system, jointly review VACOS (ph) where we can look at all of those. And the regional offices have access to it, too. That should be their primary method for tracking those. And it's different from the mechanism for claims that are not under an appeals status.

MS. KANE: But are they being tracked differently in the sense that they're being handed expeditiously, that they're given priority over other cases or no?

MR. EPLEY: I hope that they're given all the priority that they should be given. This gentleman is right, that they're supposed to be handled expeditiously. The field stations are aware of that. They're under direction to give them that expeditious handling. I hope they are. I hope they are.

MS. HERL: Glenda Herl with Carpenter Chartered. We currently have access to the veteran's network. And we've been told by several authors that they no longer update that service. And I wondered if we would be able to ask veterans for assistance to access your new program or to VACOS so that we can understand where the claim is.

MR. EPLEY: You're referring to the MAP that Ruth was talking about in the case tracking system?

MS. HERL: Four vehicles.

MR. EPLEY: We're working on a system that Mr. Thompson referred to called "TRIP." And that is a joint project to try and work with stakeholders so that we develop and move cases, get the evidence the same way whether it's done by a VA employee or by one of the representatives such as yourself. It is our intent and our hope that as people take that training, learn the systems, and get certified under the TRIP program that we can give them access to MAP for inquiry only. I don't know about VACOS. I'm not sure about that.

MS. WHICHARD: That's a BVA system.

MR. EPLEY: That's really a BVA system. But it is our intent to give you access to that system, so that if you have someone you're representing, you can see what's happening to claims as to layout. We rather that they be able to get the information from you. And I think you would, too.

MS. WHITTINGTON: Anything else? All right. Great.

UPDATE ON SECTION 5904 FEES AND EAJA ISSUES

Moderated by Ms. Cynthia Brandon-Arnold

MS. BRANDON-ARNOLD: Good afternoon. I'm Cynthia Brandon-Arnold. I'm a staff attorney for the Central Legal Staff, and it is my opportunity to basically introduce the panel and get the

session started.

The name of the session is "Update on Section 5904 Fees and EAJA Issues." We have Mr. Ron Garvin, who is Assistant General Counsel of Group VII of the VA He assumed the position in August of '95. His 34 years of federal service span many assignments and a wide variety of progressively complex Government programs. I'm reading what is in the booklet, and it was prepared by Ron, I'm assuming. This is what they've given us, anyway.

Next, we have Mr. Bart Stichman. He's the joint executive director of NVLSP, a public interest law firm that specializes in veterans law. He has served as NVLSP's director or codirector for most of the period since 1981, which is the year NVLSP was formed.

Next, we have Julie Clifford. Julie practices law in Alexandria, Virginia. She's been practicing veterans law since '93 when she took her first case through the Veterans Consortium Pro Bono Program.

That's the panel for this afternoon, and I'm sure you will enjoy it.

MR. GARVIN: Good afternoon. The format I'd like to follow is similar to what we did this morning. I'm going to give you an opening commentary, and then I will turn it over to Bart and then Julie, each in turn, and from there on, we'd like to have this as an interactive presentation where you ask the questions and we give the answers or dodge the answers, one or the other. We feel that that will be the best way to develop the issues most beneficial to everybody here in the audience.

The first issue that I want to address is the status of the 5904 fees. As you're all probably aware as veterans law practitioners, the recent decision in *Scates* kind of changed the landscape in this area. And by changing the landscape, we're talking about the authority of the Board to make initial decisions on that withholding for the 20 percent of past-due benefits.

Probably the greatest inquiry or concern for the private practitioners is what effect are the proposed or pending regulations going to have on the practice from your perspective. I'm going to give you what I feel is kind of the background and the current status on that from my perspective. Remember, when I'm talking here, I'm a government attorney, not necessarily talking for the Secretary or the General Counsel, but to give you the government's perspective from one attorney's vocal cords.

As I can best recollect the background -- coming out to where we are currently with the withholding regulations -- about a year ago, some concern had bubbled up within the C&P Service about administering the withholding concept under the then current regulations. The concern was that it was burdensome to the C&P Service, and they didn't really have anybody who was expert in effecting the program as it existed. There were some proposals made, comments within VA, and at that point about a year ago or ten months ago, and I will represent to you, as I understand it, the regulations, the proposed regulation was submitted to Secretary Togo West at that time. The proposal was that the VA would interpret the statute under the concept of "may withhold." Since that was not a mandatory, but a discretionary authority to withhold past-due benefits for attorneys, the regulation would be rewritten so that the VA would be taken out of the business of withholding

and paying over to private attorneys. And, therefore, the new regulation proposed would say something like VA will not withhold the 20 percent of past-due benefits.

Since that time, there has been a lot of discussion, and things have happened. Currently, we are at the point where the new proposed instructions, and I think they are of the same tenor -- that VA will get out of the withholding business. There's been the publication in the Federal Register, comments have been received. The VA, from the perspective of General Counsel and C&P Service, have examined all of the comments. They're still in the process of completing the analysis of the comments and will present the unified position to the current Acting Secretary. I believe, if things go efficiently, as we hope they will, that within the next couple of months, certainly by the beginning of the calendar year, we should have a regulation. I think the regulation is probably going to take VA out of the withholding concept under this regulation, but it remains to be seen.

Secretary West indicated that he approved of that position. We don't know, or at least I don't know, at this point, what Acting Secretary Gober's position will be if that amended regulation is placed on his desk for signature. That's about all I'm going to say on *Scates* and the 5904 withholding. And, of course, when we get into question and answer, you may have more that you want to develop in that area.

The secondary area that I want to talk about is EAJA fees and how they are handled within the office of the General Counsel. There is a lot of concern. We have a lot of ongoing litigation concerning fees, and it appears -- I know that for some people -- it's an overwhelming amount of litigation. There's some loss of memory on the part of all of us, but I'm going to tell you what I remember from the *Cullens* argument last week, the oral argument. I think Judge Kramer, from the bench, made a representation that, as I recall it, nearly 30 percent of his time is involved in litigation over attorney fees, and he was pontificating from the bench whether that was really what this is all about.

Well, what I'm going to do today is confirm essentially those statistics, because from what I keep within Group VII, I think that, by the end of the year, we will have about 900 applications for EAJA fees filed with Group VII, and of that, that's about 30 percent of our current workload. So I'm pretty much in the ballpark with what Judge Kramer, in framing his question, was putting out as the current status of the situation.

Now, for the purposes of practitioners that are submitting these applications to us, I guarantee you, or at least I represent to you, and you get as much a guarantee as I can give you, that each and every application is individually examined. What we're looking for is the jurisdictional requirements. Is it proper, the application? And if so, we're not going to oppose the application on jurisdictional grounds. Then we start looking for certain key issues involved in the application and I'm going to tell you very informally that when these applications are received in our office, it's kind of like a threshold. If they are $5,000 and less, they're probably going to get a lesser critical review than those from the level higher.

Now, I'm not making any representations to anybody that something less than that is not going to be examined, because we look at every one of them. We're looking for fee applications, and we're looking for particular issues and the justification for the fees. But what happens with each of those

applications -- every one, when it hits my desk -- it's opened, and I look at the application and I go through each application line by line. And I'm not making a line-by-line determination as to that application, but I'm looking at the entire application to determine whether overall it's reasonable for whatever services were performed for the particular applicant.

If I see areas in there that cause me concern, I'm going to ask the supervisor or the attorney that drafted the recommendation to come in and talk about it. Each of you private practitioners have probably received a phone call at one time or another saying that the boss wants to know. Well, the boss is me. The buck stops here. I'm the one who looks at each and every one of those things to determine whether or not it's an application that we want to look at an issue for a total request for fees.

That's basically the process that we use. You're all kind of familiar, I hope, with the litigation in this area and where we are with the court. It's my representation to this group, and it's my feeling as a Government attorney, and not as the General Counsel or the Secretary, that there's a big area that leaves a void in EAJA fees, and that is, that the court is not living up to its responsibilities to give us a good road map so that we can determine what should and what should not be contained in the applications and what should and should not be paid. Every decision we see coming out -- I know, as attorneys, we look at it differently -- we see no guidance in some areas where we really need it, so we can put an end to our disagreements in the application of the law and how we interpret the facts. And with that, I'm going to turn it over to Bart.

MR. STICHMAN: Thank you. Ron has asked that I limit the time I'm going to take with my remarks so we can devote most of the time to questions and answers. So I'm going to try to briefly discuss one issue that I think is important to many counsel for appellants that's currently being litigated before the court, and that issue has to do with the Equal Access to Justice Act and the substantial justification test, which is the major obstacle appellants' counsel face in getting awarded EAJA fees. In particular, this issue is what is fair game for analysis on whether the administrative position of the VA is substantially justified.

The Court has held for quite a while now that the administrative position that's subject to the substantial justification analysis, when a case is settled, either by a joint motion for remand or a settlement agreement, particularly by joint motions for remand, is the positions that are discussed in the joint motion for remand itself.

One of the cases that discuss that rule is the *Dillon* case at 8 Vet.App. 165, a 1995 precedent that the court has followed ever since. There are a few other cases that say essentially the same thing, and that is, when the Secretary tries to meet its burden to show that its position is reasonable in law and fact at the administrative level, the court says all they need to do is examine the issues that are contained in the joint motion for remand, meaning the errors identified in the joint motion for remand, and whether the VA's position on those issues was reasonable in law or in fact. And, that, I posit to you, is unjust and inconsistent with the intent of the Equal Access to Justice Act. And I can illustrate that point, I think, by taking an example of a *Karnas* remand.

Karnas is the case early on in which the court said that, when the statutes or the regulations change during the time a claim is pending before the administrative agency, or even on court review,

then the veteran claimant is entitled to application of either the old law or the new law, whichever is more beneficial to the claimant. So let me, to illustrate the problem with *Dillon* and its progeny, give a hypothetical of a BVA decision which denies a claim for a rating increase in a mental disorder. The veteran seeks counsel and obtains counsel to challenge that decision in the veterans court and files a Notice of Appeal. The two issues they're thinking of raising are that the reasons and basis of the Board were inadequate and a failure to assist the claimant obtain records that should have been obtained and put in the claimant's file, for example, social security records. So they file this notice of appeal, and after the Notice of Appeal is filed, the VA amends its regulations governing the disability ratings for mental disorders, which is what VA did a few years ago, as you may know. And, so, after that final rule amending the regulation becomes law, the VA General Counsel, properly so, isolates this case, saying well, this should be a *Karnas* remand. We need to agree to a joint motion for remand to send the case back to the agency to decide whether the new law is more favorable than the old law and, if so, to apply the new law.

So appellant's counsel, in such a situation, would likely and probably should agree to such a remand, because that person would preserve the right to challenge the errors that BVA had made. The BVA's decision that contains the poor reasons and bases that the lawyer was going to attack is vacated, and the duty to assist, that could be fulfilled on remand, either by complaining to the agency, which should go get those records, or the lawyer can obtain those records on his or her own to moot that issue and perhaps win the claim on remand. But if that occurs and the joint motion for remand just discusses the *Karnas* precedent as the reason for the remand, what *Dillon* holds is, in essence, that the veteran won't be able to recover attorney fees in that situation because the Secretary will be able to sustain his burden that the VA's administrative position was substantially justified. Because how can you complain, how can you blame the Board of Veterans' Appeals for not deciding the claim under new rules that the agency didn't have at the time the BVA rendered its decision.

Karnas remands always result, or almost always result, in a determination that the position of the Secretary was substantially justified. And in my example, when there's a change in rules, after the BVA decides, I think we can all agree that that looks substantially justified.

However, the veteran had to go to all the trouble to appeal, because, in my example, and I'm taking that this as a given, the BVA decision was unreasonable on its face. It didn't discuss reasons and basis and didn't comply with the duty to assist. But unless the Secretary, the General Counsel's office, gratuitously agrees to put these errors in the joint motion for remand, analysis of the reasonableness on those two issues is off bounds according to Dillon. And that isn't consistent with the purpose of the Equal Access to Justice Act, which is to encourage people to challenge unreasonable agency action and get their attorney fees paid when there is unreasonable agency action, which, in this example, there was. So that is a precedent that I believe needs to be overturned, and apparently, the court is seriously considering that itself, to its credit.

In June 2000, in a case called *Cullens*, the Court issued an opinion and then vacated it the very same day they issued the opinion, stating they were going to reconsider the *Dillon* rule, that is, to reconsider whether anything in the BVA's decision is subject to scrutiny for the substantial justification test, regardless of whether it's discussed or contained in the joint motion for remand or in the settlement documents.

Two of the judges in that panel decision that was simultaneously vacated so that the Court could convene en banc voted to overrule their past precedent, and a dissenting judge wrote that they ought to keep that precedent. But, of course, that's all up for grabs in this en banc decision which they had oral argument on last week. So I urge you to pay attention to that.

I think it's a great technique by the court to, one, reconsider its precedents and keep an open mind and not just allow the Federal Circuit to be the court scrutinizing their past decision-making, and also to issue an opinion in which they're telling the parties and amici, which they solicited in the court orders, what they're thinking about so they can reasonably address it and frame their court briefs. I think that's a great technique, and I commend the court for that, and it's a very important issue especially because of what's likely to happen in Congress.

Congress is considering right now -- actually, the House and Senate have passed bills, and now it's in conference, whether to get rid of the well-grounded-claim threshold requirement and require the VA to assist claimants in all cases. And what would happen if that statute is passed is that any case that's currently pending at any level in which the BVA or regional office has denied it as not well-grounded is going to be sent back to the regional office level to start again at square one under the rules in the new statute.

What that means, if it passes, is a lot of these cases currently pending in the veterans court are going to get a *Karnas* remand based on this new statute. And what about all the attorneys' work in preparing those cases at the court level? If the *Dillon* rule holds, they'll all lose attorney fees for all the work they've done, even if the underlying BVA decision was unreasonable, not substantially justified in law and fact. So you can see how important that is, and I urge you to look forward, to keep track of what happens in the *Cullens* litigation. Thank you.

MS. CLIFFORD: Initially, I was going to talk about the unresolved issues concerning attorney fees and EAJA fees, but that would take all day. Instead, I will focus on an area that I thought was fairly certain, that is, what is a prevailing party. I thought I knew what a prevailing party was, or at least that I knew one when I saw one. But a couple of things have happened that made me wonder if that is not the case.

To understand this, you have to go back to *Swiney v. Gober*, an August 14th decision by the Court. You may not remember the prevailing party issue, which came up in the dissent. When the attorney's motion to consolidate his case with another case, *Quigley v. West*, was denied he filed an amicus brief in *Quigley*. The Court decided the *Quigley* case favorably for the veteran but on another issue. So the *Swiney* attorney then incorporated the arguments that he had written in the amicus brief in his supplemental brief. When he applied for EAJA fees, he included the time he spent on the amicus brief. The Court gave him that time. That was not the issue that concerned me, though, because that applied to an unusual situation.

Apparently, the attorney had negotiated for a remand. The Secretary did not agree to it. Eventually, the Secretary had filed a motion for a remand. The attorney filed a motion opposing the remand and argued for a reversal. The court reversed on one issue and remanded another issue. When the attorney applied for attorneys' fees, the Secretary conceded that the appellant was a prevailing party. The court then requested supplemental briefings, and at that point, the issue came

up of whether the appellant was a prevailing party or not, and as I said, the court ultimately found that he was.

Judge Holdaway, in his dissent, wrote that he did not think the appellant was a prevailing party because the Secretary had asked for a remand, and the Secretary got a remand. The appellant was not a prevailing party because he had argued for a reversal, and he had not gotten the reversal on every issue.

What is not clear to me in this case is whether the attorney argued for a reversal and in the alternative a remand, and if that would have made any difference.

Judge Holdaway, in his dissent, also said that he would have found there were special circumstances in the case and denied the fees because they were incurred in objecting to the remedy ultimately granted. His argument was that the court would be granting a license for attorneys to incur EAJA fees, even if there was no hope of actually obtaining the relief sought.

Judge Nebeker, in his concurring opinion, disagreed and said that, as long as there was a basis for a greater remedy that's not frivolous, we have a professional responsibility to go ahead and pursue those remedies.

Judge Holdaway also urged the Secretary to request an en banc decision "in this egregious case," and the Secretary, unless something has changed since this morning, has not requested that, right?

MR. GARVIN: Right.

MS. CLIFFORD: This issue came up again during the *Cullens* oral argument last week. Judge Kramer commented in that argument that he was not convinced that the appellant was a prevailing party.

The other comment made during the *Cullens* oral argument that I thought was interesting was that Judge Steinberg asked the VA -- Randy Campbell was doing the argument, and Ron Garvin and Leigh Bradley was there -- if they would object to a court rule requiring a statement that the EAJA issues had been resolved before the clerk dismissed the case. There was not a lot of discussion on that issue, so I don't know if he was talking about the amount of fees or just a statement that the parties had agreed that there was not substantial justification and the appellant was aprevailing party and so forth. One of the judges commented that the prevailing party issue is jurisdictional, so it wouldn't matter if the parties agreed whether the appellant was the prevailing party or not. So I don't even know if that's a possibility.

I think attorneys would have strong objections to having the amount of our fees mixed in with a settlement agreement. In other words, you don't want to be pitted against your client. You don't want to be put in this situation where you say, "I'll give you two hours if you agree to remand the thoracic claim."

I used to do divorces -- I'm sure none of you who have ever gone through a divorce have ever done this -- but the parties would be arguing about the wineglasses or some other object, and finally,

the attorneys would get together and say, "please, we'll just buy you another set." Of course, the people getting a divorce would not want another set. They had to have that set. My point is I don't think we want to get in that situation.

Judge Kramer said that he spends 25 to 30 percent of his time on fee agreement issues. I thought the idea was interesting of using the court rules to get at some of these issues. I know tomorrow there's a session on the court rules, and I don't know if that will come up.

We all know that many of our clients are aging, and time is of the essence to them. I think the VA says that 1,500 veterans per day are dying and a thousand of those are World War II veterans. I think a lot of our clients want closure. I think that every minute spent litigating EAJA fees takes away from substantive issues.

One of the attorneys this morning, Cindy Smith, an experienced veterans law attorney from California, reminded everybody that we want to submit reasonable applications. I've noticed from the court decisions that some attorneys still have paragraphs in their fee agreements that the Court has clearly said are not reasonable, such as liens on a client's claim and paragraphs saying it's your right to file the EAJA applications. It might save a little bit of time if we remove the paragraphs that have clearly been litigated.

MR. GARVIN: For the purposes of the record, when you have a question, would you please identify yourself by stating your name and spell it for the court reporter.

Questions?

MR. BARRY: Kevin Barry. I don't do a lot of work, and I don't file a lot of EAJA petitions, but I filed one a few years ago where the Secretary took my schedule of time and redid it and recomputed all the hours. That's what I believe the Secretary believed would be appropriate, not what I put forth as hours actually spent. And I was wondering, not knowing what the current practice is, does your office still go through and recompute the times that are alleged, or do you follow what was at that time the Supreme Court precedent just to take a percentage?

MR. GARVIN: What we do, Mr. Barry, is we go through the entire application. Although we look at each entry, we're not weighing entries or recomputing. What we're doing is looking for those aspects of an application that are either unclear so we know what the effort expended by the attorney was or the issues that were addressed, whether they were -- in other words, we're looking at not only the total hours, but the productivity. Was it redundant or was it a learning process, and things of that nature. And we make an educated guess based upon what's in the total application.

MR. CHISHOLM: Robert Chisholm, president of NOVA, C-H-I-S-H-O-L-M. Two questions: You said there were 900 applications you expect by the fiscal year 2000?

MR. GARVIN: Yes.

MR. CHISHOLM: Do you have a total number of EAJA fees for last year?

MR. GARVIN: Last year, our applications were somewhere in the neighborhood of 800, and we paid out 2.8 million. This year, there are going to be 900 applications that at the current rate will pay over three million.

MR. CHISHOLM: Now, for the more important question for private practitioners: Is the response that this regulation that you're no longer going to withhold benefits -- I think you said 20 percent -- retroactive because of the *Scates* decision? In other words, this isn't the response to the *Scates* decision?

MR. GARVIN: No. That amendment to the regulation has been working for well over a year, two years, actually.

MR. CHISHOLM: But now it is, if I understood correctly, in the process of the finalization of this rule, it's before VA General Counsel and the C&P Service.

MR. GARVIN: What they're doing is making an assessment -- the examination of the comments that were submitted concerning the proposed regulation. And of course, that will have to be included in the final promulgation.

MR. CHISHOLM: What can you tell us then -- let's be optimistic -- from the private bar's perspective, if that doesn't happen in the regulation, what is the VA doing about the *Scates v. Gober* decision? Who's going to be handling the withholding issue in the meantime?

MR. GARVIN: In the meantime, there are two simultaneous actions that are ongoing. Number one, within the appellate litigation group, Group VII, we're looking at those cases that need to be remanded-- where the Board has made the decision, we think is contrary to *Scates.*

Secondly, the Board itself is reexamining what they have within their cohort, so to speak, and they're doing the same thing. They're getting prepared to return those for the initial decision to the C&P Service.

MR. CHISHOLM: Does C&P Service have some kind of process in the wings, so to speak, as to how they're going to withhold fees and hopefully pay fees? That's really the heart of the matter, isn't it, from our perspective?

MR. GARVIN: I wish I could answer that definitively. I can't. I think they're still in that mode where they're examining the total impact and trying to determine what's the most effective and efficient way to get the cases back to the ROs. Julie?

MS. CLIFFORD: I've got a question regarding that. This morning I referred to a letter from the National Organization of Veterans' Advocates that had been sent to Mr. Epley with copies to the General Counsel trying to open a dialogue concerning the implementation of *Scates.* One of my concerns has been that the veterans service organizations have met regularly with the VA for years, but the private practitioners and attorneys have not had that kind of dialogue. This morning I asked you about that, and you said according to that --

MR. GARVIN: You asked, and I said I'm committing myself to taking the issue to the General Counsel, and I'm putting myself on report. We're going to get the private practitioners involved also.

MS. CLIFFORD: You referred to a meeting in November, and I didn't followup on that question. What kind of meeting?

MR. GARVIN: The next scheduled meeting with the General Counsel and the VSO reps is in November, and what I'll do is target that November meeting to include private practitioners or reps of the private practitioners.

My question to the private practitioners is, of course, we can't open it up to everybody, so who is going to be the representatives? And I'd ask Mr. Chisholm to give us some notification as to who might be invited to those meetings as regular attendees on behalf of the private bar.

MS. CLIFFORD: Another question I have is whether the VA is contesting EAJA fees for remands based on *Nolen*?

MR. GARVIN: Help me here. What --

MS. CLIFFORD: That's the Federal Circuit case that says if the BVA found a case well grounded the court cannot readjudicate --

MR. GARVIN: We're looking at our cases internally to find out if we have any of those that are affected. And if cases that we have are affected by Nolan, then we will be moving for the remand, I believe.

MS. CLIFFORD: But the question was: Are you going to grant EAJA fees in those cases?

MR. GARVIN: Under the current situation, as we understand the law currently, if it's a change in law, no, unless there's another issue that's involved.

MR. STICHMAN: That falls right into my discussion of *Dillon*. This *Nolen* decision is another example of a that causes a *Karnas* remand in which a perhaps unreasonable BVA decision that had to be taken by the appellant to court in order to prevent it from being a final decision results in no fees at all being paid under the *Dillon* precedent to appellant's counsel, which I think, from my point of view and many others, is unfair.

MR. GARVIN: If I can summarize that, I think the private bar is saying that strict remands based on a change of law is unfair to the private practitioner because they have a significant investment of time and effort in this case. I sympathize. Unfortunately, as we read it right now, that's not the law, and you would not be entitled to EAJA fees in those cases. On the other hand, if you have private fee agreements, or agreements, you can still collect your fees, as I understand, but not EAJA.

AUDIENCE PARTICIPANT: Assuming the Government's still withholding?

MR. GARVIN: Assuming the Government is withholding and we pay the proper party. You're

right.

AUDIENCE PARTICIPANT: I would invite your attention to the *Bowey v. West* case, which was in the Federal Circuit on EAJA fee cases. I don't know if that was raised during the *Cullens* argument, but in *Bowey*, the issue was substantial justification on what is the record to look at, and I think the Federal Circuit provided some guidance. That may have some impact on this *Cullens* decision.

MR. GARVIN: *Bowey* was mentioned, I believe, in *Cullens*, and at least from Government counsels' perspective we interpret record to mean that which is before the court when the action is taken. In *Cullens*, of course, it was a settlement. In most other cases, as we pointed out this morning -- correct me if I am wrong, Bart -- in joint remand cases, you have a record which has been filed. In *Cullens* that was not the case. *Cullens* was a settlement before a record was filed.

Now, there is the opposing view, and I'm not stating an opinion on that, but the other view is, if you have a BVA decision, of course it's based upon what is contained in the claims file. Does that therefore mean the claims file is part of the record? I don't know. Nobody has addressed that issue.

MS. SIMMONS: I'm Cynthia Simmons, a private practitioner and relatively new now to the whole process. I've handled two cases, but I've been told definitively by the General Counsel that you all write the joint remand. And on both of the cases that I submitted to them, is that true that you are the only ones who can write the joint remands?

MR. GARVIN: No, that's not so.

MS. SIMMONS: That's what I was told by the attorneys each time. In my naivete, I was like, they're great guys. They're going to write the joint remand for me.

MR. GARVIN: The more common practice is, we write them and submit them to the other counsel for concurrence or approval, but that's not the rule. If we have well-drafted, good remand motions submitted to us that we can edit and review, we'd love that. It would save us an awful lot of work.

MS. SIMMONS: Right. But that's not the way it's being presented. Like I said, I'm relatively new to the process, but it was presented to me, "Our office writes the joint remands," like I did not have a choice in the matter.

MR. GARVIN: That's not correct. If somebody represents that, you can challenge them on it. Yes, Bart?

MR. STICHMAN: Maybe it would be useful to go over a little bit of what the give-and-take was in the last session. That might elicit some more questions or comments.

One of the issues we discussed in the morning was Ron's desire that this court lay out more guidelines on what a reasonable fee is. And you can correct me if I'm not representing your position accurately, but I think where Ron was going is, one of the things he would desire is a ballpark figure

for what's reasonable for various different activities that lawyers frequently engage in when they're bringing an appeal before the court. There were some responses from the audience saying, well, no other courts do that, provide such guidelines, because cases differ so much and the experience of attorneys differ so much and the record differs so much, and the issues being litigated differ so much that you really can't set such guidelines.

The other point Ron made in that general area was that he thinks this court is deciding fee applications differently than the other federal courts do. And he points out, properly, I believe, that in the other courts, there's fact finding and discovery allowed before the court decides what's a reasonable fee. He's right. If you're in U.S. District Court, I've had my deposition taken on attorney fees applications on a couple of cases. I've been served with interrogatories, request for production of my time sheets, et cetera. So I think Ron is correct that, in other federal courts, there is a discovery and a fact-finding process.

And he was complaining that, in this court, there is no such thing. Well, my response to that in the first session was: It's not up to the court to establish the right to discovery. Nothing prevents the General Counsel's office, if it has questions about why counsel took so much time on a particular matter, or if it wants to see the time sheets to help resolve the discrepancies of what happened, from asking for it. And I think it's inappropriate to blame the court for the fact that the General Counsel's office is just sitting on their hands, not asking for more information and then making blind allegations in the court unsupported by any evidence, when the reason there's no evidence about it is because they never asked.

MS. DORNBURG: My name is Erica Dornburg from General Counsel's office. I wanted to comment on that. I do understand what you're saying. I think a lot of this EAJA stuff comes down to negotiations, professionalism between the parties. I also want to say that I think the VA, at least, is very frustrated by the fact that we don't have a lot of guidelines on EAJA because our EAJA is not like anybody else's. And also because when we do seek to get those details, whether it's privately or from the court, for a bill of particulars or something of that nature, the court does ask us to resolve those issues outside of the litigating arena. That's why they have the Rule 35 conferences. So that is a way of the court trying to get us to resolve it on our own, but it still leaves us with, how do we guide ourselves in determining what is reasonable, what is substantially justified, prevailing party, all the rest of these issues. That's something we address every day when we go through this.

MR. GARVIN: If I may, first of all, your suggestion that I want specific amounts for individual cases, that would be nice, but that's not exactly what I asked for. I used the example that if the court told us a one-issue case with a 150-page record is worth $5,000, that would be great. We'd all love that, both the private bar and Government's counsel, because it takes away all of the frustration. It would also eliminate discretionary considerations. It's a straight accounting situation, and you get to the end.

What I was looking more for, Bart, is that guidance that Erica just mentioned. And the comment about us developing the evidence, I think, from a Government attorney's perspective is illustrated in some of the frustrations that we see here. Because even when the court comes down in those few cases that we, quote, "win," where they say, yes, something in this particular application is

unreasonable, the court in most instances doesn't tell us what area is unreasonable. They say get together for a Rule 39 conference and settle it. We want to wash our hands of it.

MR. STICHMAN: But if they don't settle it at the conference, then they will decide, right?

MR. GARVIN: Yes, I presume so.

MS. CLIFFORD: Ron, I'd like to disagree with your statement that the private bar would necessarily love being paid a flat fee per issue. I personally, and I don't want to speak for other people, but I think for one thing, we would not necessarily agree on what the issue was, and obviously, there are issues and there are issues, and some are much more complicated than others.

MR. GARVIN: I stand corrected. The other aspect of it is, from a Government attorney's perspective, as I mentioned this morning, there are many memoranda decisions that we look at, as Government counsel, in which the application is approved, and the Government's decision is denied. The Court goes on to say, because the Government has unsupported allegations of unreasonableness and so forth -- and quite frankly, from a Government attorney's perspective, we don't have a vehicle to establish any evidence. This is the appellate court. And we don't have this thing they have in the district court where the trial judge has seen and heard what went on in the courtroom. Here, what we have, we perceive, from the Government is an application signed at the end that says, I swear that the foregoing is true; and the court treats that as evidence. On the other hand, from the Government's perspective, we have 40 practitioners that do this day in and day out. If we represented that it's unreasonable, they're bald assertions on the part of the Government, they're discounted. We're frustrated with that, quite frankly. Yes, Kevin.

MR. BARRY: Ron, have you begun to keep time reports in the General Counsel's office? I ask that question in the context of a fee agreement where you rewrote my entire schedule, reduced all of the hours, and told me I was unreasonable and you were reasonable. But I don't know how you know what's reasonable to write a brief when you don't keep hours yourself, or at least you didn't at that time.

MR. GARVIN: No, we don't keep hours. What we do is make a reasonable assessment. Remember, the hours expended are not necessarily the reasonable hours that will be compensated. We have to make a weighing of the application and issues in the case because unproductive and duplicative and whatever that other term is, efforts, are not compensable in an EAJA application. So if you're learning the law, the Government is not responsible for paying a new practitioner for 48 hours to learn what a well-grounded claim is. That's part of exercising billing judgment, in our opinion. I think the case law would support that.

MR. STICHMAN: To be repetitive a little bit, your point about not having the evidence to support your allegations of unreasonableness is that you don't have a vehicle to obtain evidence. You do have a vehicle. It's a computer. Type out a letter. You send it to counsel for appellant asking whatever questions you want to ask, and ask for theanswer you get to be in writing. Then submit it along with your opposition to the fee application, and that's your evidence. This evidence is out of the mouth of opposing counsel. It's reasonable for the Government to be able to question how people spent their time. If they think the itemized statement is insufficient to provide you with

the ammunition, go get the ammunition. But to complain that the court isn't helping you in the effort is looking to the wrong place. You have the capability in your office to get the evidence you want. You're just not doing it.

MR. GARVIN: Let me respond first. Pending before the court are not one but several responses in which we have asked the court to order the opposing counsel, where we're questioning the application, to present us with the contemporaneous time records of the attorneys. We have not had a response from court on that yet.

MS. CHOU: Marian Chou, C-H-O-U, I'm from D.C. and in private practice. The experience I deal with is very complex. Unfortunately, this one make me remember him. I'm not going to mention his name. He called me. He said, well, Ms. Chou, you had a phone conference with your client. I said yes. Why isn't in your bill? I said because he called me. This kind of commonsense stuff, why would I fabricate I had a phone conversation with my client? Because it's not reflected in my bill? Then he asked me to give him every phone bill I have with my client, which I did. But I thought about it. Why should I dig more, reveal my other client's confidentiality to him? But like Mr. Stichman says, your counsel, from my impression, is being trained how to nitpick my bills.

MR. GARVIN: This is a defensive statement and not a statement of fact. I don't think anybody's nitpicking. When we look at an application and an affidavit from counsel, if it doesn't provide us enough information to make an intelligent assessment of what happened, we're going to ask for more information. And to also address you, Bart, that happens more frequently than not. And most of the time, when we ask for that information, like we did with you, Marian, you provide it. That's normally the end of it. If it establishes what we're questioning, then we go on and settle the thing.

MS. CHOU: The point is, he does not ask me why you spend so much to do legal research. He does not ask me why you spend so much hours on review of C-file. He's nitpicking on my phone bills. That's the point.

MR. GARVIN: I don't know in this specific case. Maybe there was -- maybe, in the eyes of the responsible attorney, there was just an excessive amount of phone time billed to the Government, or I should say applied for in the EAJA application.

MS. CLIFFORD: I have a question regarding your problem with the Court setting guidelines. Is it because of discomfort of the individual attorneys in having to negotiate and discuss it with other attorneys or is it that you're unhappy with the results in the court? When I look at the cases where the Court granted EAJA fees, they look pretty reasonable. When I look at the cases where there's this initial number, and you kind of go, wow, there must have been a lot of motions back and forth in this case, the Court will generally reduce those fees on some legal basis. So that's my general impression, so I'm not quite sure --

MR. GARVIN: From the Government's perspective, no, we're not concerned about the bottom line. Was it $2,000 or was it $20? Was it $200,000? What we're looking for is the rationale as to why that particular application was cut. And as I indicated, we have a lot of orders in which -- or decisions where the court will say, yeah, this is unreasonable, or whatever, settle it in conference, rather than the court coming back and saying, yeah, there is some unreasonable time. It's a one-issue

case on settled law. And 80 hours of research -- that is unreasonable -- so we're going to cut it by a certain amount. Or other areas such as if they're going to make adjustments in particular evolutions going into the case that we questioned as being paralegal activities billed as attorney hours. And rather than the court saying, we agree with you, that the development of a calendar is a paralegal, not necessarily an attorney function. All we're looking for is, give us some specifics so that we can apply them when we're making the assessment of the application. Yes, sir?

JUDGE STEINBERG: What I'm hearing is that the bar feels that there is kind of an imbalance in the motion process over EAJA fees. Maybe I'm getting the wrong impression. I've only been here for about a half-hour. But I just wanted to note for the benefit of the bar that the Court is not particularly anxious, and certainly the judges are not particularly anxious, to get into the determination of reasonableness in terms of fees. And you are not at the mercy of the General Counsel. I'm sure the General Counsel does its utmost to be reasonable in dealing with you, but if you're convinced that they're not being reasonable, you don't have to accept that settlement. When you go to court, if you ultimately prevail, you're going to be entitled, almost in every case, to the fees for fees, which means the amount of time that you spent arguing with the General Counsel and filing the papers in the court with respect to the fee issue is going to become compensable to you under the EAJA. So I just wanted to stress to you that you're not at their mercy. I'm sure they try to be reasonable. In an occasional case, they may not be reasonable, or there may be a particularly zealous counsel who is asking you things that they shouldn't be asking. You don't have to accept that offer. You have a right to a decision from the court if you don't settle. And, frankly, as I read our case law, and I think I see all the cases, I don't see the court intervening on the reasonableness issue in a substantial number of cases. Maybe other people read the cases differently from the way I see them. So you have options, and you don't have to accept what the General Counsel is offering you, and you don't have to present responses to all of their inquiries if you're convinced that you have presented a credible case.

Please, Ron, feel free to respond to that, and I will say it's not my impression that you are unreasonable, but I just wanted to make clear that you've never suggested that appellants' attorneys have to accept your offer.

MR. GARVIN: I'm going to respond and echo just what you said. We look at each of those cases. We think we take what is a very reasonable position. There are some issues that we will take to pleadings, to briefing, or whatever it takes, because we think it's a significant issue that's not been adequately defined by the court. But those are few and far between. Of the 900 applications that we have this year, and I don't have the exact number, but I feel very confident, although it seems like there's a lot of litigation going on in that area, we probably only get down to litigating, on a contest basis, about 30, maybe 40 of those cases in an entire year. So the ones we do oppose, we pick and choose very carefully for more specific reasons.

Now, a lot of the negotiations that go on, back and forth, and that cause us concern with one another end up actually being resolved by compromise. Because, number one, the Government probably decided the case is not worth the effort -- not necessarily -- but the Government, who is opposing counsel, feels that the issue involved or the money involved is not worth it. And we end up settling a lot on that basis.

MR. STICHMAN: It sounded like part of your complaint was that when you do take the trouble to write an opposition brief on fees, that the court orders you to a settlement conference under Rule 35, or whatever the rule is, and I thought that's not what you wanted the court to do. You want them to set some guidelines; is that it?

MR. GARVIN: In those cases that are fully briefed and submitted for final resolution, yeah.

MR. STICHMAN: But just as Judge Steinberg said, when you go to settlement conference, nothing binds you to agree to raise your offer. You can bring it back to the court, and they would have to address your issue, wouldn't they?

MR. GARVIN: Absolutely.

JUDGE STEINBERG: That's two ways you can bring it back to the court. I don't want to encourage you to do that, but I think it's important that you recognize what your leverage is in these negotiations. And, frankly, I don't think I'm reading between the lines in what Mr. Garvin has said to infer that they're not particularly anxious to litigate these cases. They would rather, in terms of economical use of their office time, settle these cases out. And they don't get any money from the fees for fees.

MR. GARVIN: I'm going to say something I said earlier today, and I know some of the private bar take issue with this. We are all in this arena for the same reason. And that is to take care of veterans, to ensure veterans get justice and the right thing is done. Now, we come at it from different perspectives, but the bottom line is, we want to make sure every veteran who has an entitlement receives it appropriately, timely, and properly.

Mr. Barrans.

MR. BARRANS: If that is indeed true, might I suggest that the VA withdraw its perennial opposition to attorneys becoming involved earlier in the case so these cases can be adequately briefed and the records adequately developed at the regional office and not after the BVA has already made their first and final decision against the applicant.

MR. GARVIN: That's a statement, and not a request, because I don't have any control over that.

MR. BARRANS: But you have an input. You're at a pretty high level in the department. I know I presented this to the previous General Counsel, and I received the standard answer. And I expect that will be the standard answer until Congress changes it, but if that is indeed what we're trying to protect, the veteran, I think we would look back to what Professor Fox has been saying for years. And we should try to see whether everybody in the system on both sides can work toward assisting the veterans to develop their cases at an earlier stage to be properly resolved the first time.

MR. GARVIN: This is not the position of the VA or anybody else. But I'm just going to make one observation, for what it's worth. If you put attorneys, you inject attorneys in at the regional office level, you have highly sophisticated and trained individuals in there with a legal controversy which is communicated with ratings specialists, who are, at best, high school graduates. And, point of fact,

they are intimidated by the attorneys who come through the front door. You then create an uneven playing field, I think, for a nonadversarial adjudication of a case at a lower level.

Now, having said that, one person's opinion, for what it's worth: If we open the doors and allowed practitioners in at the regional office and the Board level, would it make much of a difference? Probably not. I don't think that there would be that many practitioners in at the regional office level, nor at the Board level. So that the system would be that badly upset. But that's one person's opinion.

JUDGE STEINBERG: Well, they're allowed in now.

MR. GARVIN: They certainly are, sir. They can go anytime for a pro bono representation, or $10, whichever is more.

MS. CHOU: What is your basis to say that?

MR. GARVIN: My basis to say that it would not upset the applecart?

MS. CHOU: Yes.

MR. GARVIN: It's just my feeling. It's one person's observation based upon my background and experience. Yes, sir?

MR. LAUGHLIN: My name is Rob Laughlin, and I'm a private attorney from Omaha, Nebraska, and I've been involved in veterans benefits and have been representing veterans since '90. And I find your conclusions don't fit with my experience whatsoever. In Nebraska, I think we probably have two lawyers, maybe three lawyers, representing the whole state. The reason I can't get more lawyers involved is they don't want to take cases on, maybe they might get paid on some third-party fee agreement.

When I go in front of the regional office, I'm finding that I'm welcome down there. They welcome me to be there because they think, finally, this veteran is going to get some help. I don't see that they're intimidated. I don't see any of that. I think most of these veterans are so upset they haven't been able to get good help over the years, they're relieved when they find somebody that can help them.

I think there's got to be some serious changes with attorneys' fees. I think the biggest problem is trying to get service organizations to admit that there's a role for lawyers, and they're not out to take anybody's numbers away. What disturbs me is when somebody comes to me and I talk to them, I don't want to say come back and see me in two years when your record is challenged.

MR. GARVIN: Your observation is correct. I don't know this as fact, but I'm stating an impression, that the greatest opposition to attorney involvement at lower levels is by the VSOs, more so than by the department. Sir?

MR. KRAMER: Richard Kramer. It also seems that the retroactive benefits are based on how long you are into the claim. Therefore, attorneys only come in very far into the process. That

means a larger portion of the retroactive benefits are going to be paid to attorneys. Attorneys don't generate any fees after the benefits are granted. So it seems disingenuous by the VA to say, well, we want to save money by not hiring lawyers, but we're only going to have lawyers come in after four or five years of those benefits are gone. The fee will be generated on four or five years as opposed to six or seven months.

MR. GARVIN: The comment, for those of you in the back, was that it doesn't track that we want the attorneys to get in later in the litigation, because they can only get 20 percent of past-due benefits, because if they were in at the RO level, the amount of past-due benefits would be much less, having resolved that case two or three or four years earlier. That's a good observation. Thank you.

Let's limit it to two more questions. We have to get back in there if we have them. Well, if there are no questions, I want to thank everybody for your participation. Thank you, judges, Cynthia.

MS. ARNOLD: On behalf of the court, I have momentos for the panel, and I'd ask for just one more round of applause to thank them for their time and energy.

THIRD PLENARY SESSION

JUDGE GREENE: Let's see if we can get started. I have an administrative announcement to make, and you have to listen to me seriously.

As you know, the Chief Justice spoke to us this morning, and one among us had the initiative to stop him and get him to sign the letter that's in the front of the binder. And he has the Chief Justice's signature, and then he set his binder down, and now he can't find it. So if you have a binder containing the Chief Justice's original signature, I'll give you $5,000.

(Laughter.)

JUDGE GREENE: Not really. I was just kidding.

But, really, would that person stand, first of all? I want to applaud you for your initiative.

Okay, sir. All right. Here he is right here. Look at your binders. If you have the original signature, put -- and your name, sir?

MR. FARBER: Shelly Farber.

JUDGE GREENE: Shelly Farber from?

MR. FARBER: West Chester, Pennsylvania.

JUDGE GREENE: West Chester, Pennsylvania. Okay. No one is moving. Okay.

MR. FARBER: Thank you.

JUDGE GREENE: Yes, sir, Mr. Farber. E-Bay tonight, right?

It's my pleasure now to present one of my colleagues, Judge Don Ivers, who will introduce our guest speaker.

JUDGE IVERS: Thank you, Bill. You know, it's been said that judges are really just law students who get to grade their own papers. That's not exactly true for this court, and I've been asked to introduce Professor Fox, who really probably doesn't need any introduction, but I'm going to do it anyway.

I was given the short bio form that you have in your materials at Tab 3A, when I was asked to introduce him. And looking for more, I called Professor Fox's office, and the next day, by parcel post, I got Professor Fox's complete biography and CV.

This man has been everywhere. He's done almost everything in the area of administrative law. He has lectured or is lecturing in Europe, Asia, Latin America, as well as keeping up with the judicial review of veterans benefits decisions.

In looking through the material on Professor Fox's background, way down at the bottom of his long list of accomplishments, I found that our paths had crossed at the University of New Mexico in Albuquerque, where we were at about the same time and during Army service. And both of these, in my opinion, enhance Professor Fox's credibility.

(Laughter.)

JUDGE IVERS: So, without further ado, Professor Fox, we're here to get our grades.

(Applause.)

PROFESSOR FOX: Thank you very much. As usual, I'm very flattered to be asked to be here. I've got some comments to make, standing up here at the lectern, and then, because of the problem with remotes and things like that, I'm going to take the cordless microphone and walk over to where my laptop is to do a Powerpoint on a couple of things that I think you'll enjoy thinking about and discussing when we have the questions and answers.

I actually have three things on my plate right at the moment. One is the traditional thing, where I come before you and talk a little bit about what the Court -- this court has done over the last couple of years.

A second thing I'm going to talk a little bit about is the precursor to an anecdotal history of the Court, a tenure history that Judge Nebeker asked me to undertake just recently, for which I'm doing interviews and collecting data, some of which you'll see towards the end of my Powerpoint presentations.

And then, finally, I'll give a little blurb to a report that's coming out shortly on the Board of Veterans' Appeals.

I'll leave it to you to judge the credibility and the quality and the worth of my study on the Board. I can tell you that it currently comprises about 150 single-spaced pages, and about 405 footnotes.

I have to tell you a secret. Academicians who weigh law review articles, rather than read them, would give me a great deal of credit for what I've done.

Judge Nebeker asked me today to talk just a little bit about the history of the Court, more by way of reminding you where we were and where we've come in the last several years. And I always enjoy going back before the VJRA, looking at things then and seeing where we are now.

Before 1988 we had a Veterans' Administration that wasn't accountable in any way, in the same fashion that Federal administrative agencies are. A VA that was not required to produce rules by way of notice and comment. A VA that exercised almost unfettered discretion with regard to passing on individual veterans' claims, and, finally, a VA that was only casually overseen by Congress and a Federal agency that almost never saw lawyers because of the $10 fee limitation.

I wasn't terribly happy with that. I don't think very many people were.

We got the statute. I think the statute is a blessing, no matter how you come out on some of the things that have happened since then.

And think of what might have been. As I was going over some of my materials, both for the written history and for today's talk, I looked at some of the proposals that floated around both the House side and the Senate side before we got the VJRA that we actually have.

One proposal you may recall, taking all claims decided by the Board of Veterans' Appeals directly to the individual geographical circuit courts of appeals.

Now, think about that. That may work as it does in, for example, the Federal Energy Regulatory Commission, with a whole body of administrative law judges who produce records sometimes comprising 100,000 pages, and in an agency that provides an enormous amount of procedural due process, accompanied by proper lawyering.

I'm not sure that would have worked. BVA decisions going directly to a conventional Article III federal circuit.

I think of another proposal that floated before we got our statute. Removing the Board of Veterans' Appeals from the department and simply making it the Court of Veterans Appeals.

I am not casting aspersions on the Board of Veterans' Appeals, but as you know, one of the stumbling blocks in dealing with this area is at least the appearance that the BVA is kind of a captive agency, and simply moving it wholesale outside the department and setting it up as a court, to me, probably at that time, and even now, doesn't make a whole lot of sense.

So what did Congress do? They gave us the statute we're currently dealing with and, obviously, something that we're going to have to live with, at least for the foreseeable future, notwithstanding Jim O'Reilly's comments in his breakout session. I understand they were quite well received and interestingly received, and more about that in a few minutes.

What do we have now? We have a court that has been in existence for slightly over ten years. We have a court staffed by judges who, when they were originally appointed, brought with them more than 150 years' collective experience in the practice of law, in addition to an enormous amount of experience in legislative matters, in Federal agency work, in judging itself and any number of other things.

Virtually all of the judges -- virtually all of the judges are veterans of one or another of military service, a number with combat service in Vietnam, for example.

And they came together in this now prominent and important court without antecedent to try and develop a body of jurisprudence that simply had never been seen before. That's where they started.

And one of the things I did in getting ready for this talk was dig into Darlene's file. She's actually the Court compiler of photographs. And I was able to see a photograph of 1625 K Street, Northwest, which is the very first offices of the court.

And I looked at that and I said, "Boy, you know, putting aside anything else, we've really come a long way."

Now, where have we come? Well, the Court's functioning, without question. And it decides a lot of cases. It has decided, just as a matter of statistics, more than 15,500 cases in its existence, having taken more than 17,000 cases up on review.

The judges are now starting to squabble with each other. I like that. A court that does not squabble within itself is a court that is very unhealthy. I like dissent. I like concurrences. And I think that shows you that the judges are thinking for themselves when they decide cases, and I think that's a very good sign.

The Court's opinions have lengthened. I absolutely love going back to 1 Vet.App. 1, *Matter of Quigley*. And if you have a chance to go back to *Quigley*, it captures everything that this court is all about.

It wasn't an appellate brief that came in, or even a notice of appeal. It was a letter. That letter was written and signed by a pro se claimant, and the pro se claimant, because he obviously was not a lawyer and because he obviously did not understand the conventional Federal appellate process, lo and behold, asks this court -- and here I think is a built-in joke -- asks this court for extraordinary relief in the nature of mandamus.

(Laughter.)

PROFESSOR FOX: Now, he didn't call it that, but that's exactly what he was asking for.

The Court took him at his word. They accepted the letter because they decided in their very first case that pleading requirements will be relaxed, particularly for pro se appellants.
They accepted the letter and they read the letter as lawyers would read the letter, as essentially a petition for mandamus, and concluded that they had power as an Article I court of the United States, under the All Writs Act, to issue mandamus if an appropriate case comes up.

But, of course, as I've said more than once here, the final disposition was also typical of this court. Writ of mandamus, Denied.

But go back to *Quigley* and notice how short *Quigley* was and notice that *Quigley* cites very few cases and cites no cases belonging to what was then the Court of Veterans Appeals. It was truly a court without antecedent.

Now, when you look at 1 Vet.App. and compare it with 12 Vet.App., you see a lot of different things. One of the things I see, number one, is an increase in the precision and overall quality of the opinions.

Another thing that I see is an increase, and I'm not talking here only about Judge Steinberg's opinions, but I'm --

(Laughter.)

PROFESSOR FOX: -- what I see is an increase in the length of the opinions --

(Laughter.)

PROFESSOR FOX: -- such that now, every year, when PVA asks me to do this, I kind of have to think about how long it's going to take because the opinions are so much longer than they used to be.

It's also a court going through a bit of a transitional period, even now, ten years after founding, apropos of this Powerpoint that I'm going to show you in just a few minutes, which probably duplicates some of the things you looked at in the breakout sessions this afternoon and earlier this morning.

But, at any rate, where are we? I am blessed by the fact that you've got in front of you my written materials, and as a consequence, about the last thing you want is for me to drone on and on and on about A versus West and B versus Gober and C versus Brown, and things of that sort, and I don't propose to do it.

I'm just going to call your attention to some of the things that I see as highlights over the last couple of years.

First of all, *Evans v. West*, a case that I read, and I hope appropriately, as at least in dictum, an extension of equitable tolling, not only to notices of appeal, but also to notices of disagreement. That is a development that should -- that has been a fairly long time coming, which I think is

exceptionally welcome in a court that faces the pro se ratios that this court faces.

I wouldn't forget missing filing deadlines in any federal of appeals that is essentially managed by and run by and totally occupied by lawyers. But in this court, equitable tolling, I think, makes a great deal of sense.

Now, one question. What this court has done, as you've already seen in a number of other cases I cite in the same portion of the handout, it's bought itself, I think, an unending line of cases by which, on a case by case, fact by fact basis, this court is going to have to decide when, and under what circumstances, equitable tolling is appropriate. And that, I think, is going to be one of the places where the judges really earn their pay.

The court, I believe, has done a good job at the Equal Access to Justice Act line of cases that they've deal with. I follow EAJA and a lot of other federal circuits *because I do a firm out of EAJA work totally unrelated to veterans appeals.

And this Court is developing as rich a body of EAJA case law as any federal court of appeals that I run into.

What disappoints me, however, what really disappoints me -- and I've been looking for this now for the last six or seven years -- I don't see other federal courts of appeals citing this court's EAJA decisions, and they ought to. This court has made some extremely sophisticated case law, and has pretty much sharpened a number of very important issues in EAJA that a lot of other circuits, I think, could benefit from, if they chose to expose themselves to this court's case law.

The court has been grappling with the well-grounded claim issue now for quite a few years. When I first started thinking about what I was going to say this afternoon, I was going to ask this:

Would any claimant's representative in this room who likes what this court has done with well-grounded claim please stand up.

(Laughter.)

PROFESSOR FOX: And then I realized that if you did stand up, we'd probably have a little blood on the floor. So I'm not really asking that. That's a law professor hypothetical.

And as we'll talk when we look a little bit at the Federal Circuit stuff, I think there are some salutary changes coming in well-grounded claims. Actually, they're already here, quite frankly. And while I, personally, would have handled the matter differently, I would have made it a matter of notice pleading as we contemplate that particular doctrine under Rule 8 of the Federal Rules of Civil Procedure.

As you know, the Federal Circuit has chosen to handle well-grounded claims -- I should say the well-grounded claim concept -- under the notion of a motion to dismiss for failure to state a claim upon which relief can be granted.

I think you actually get to the same place, whether you do it by way of what Fox would have done, notice pleading, which is consistent, by the way, with most other federal administrative agencies, or whether you take the Federal Circuit route.

I think where we are now, finally and hopefully and helpfully, in well-grounded claims, as the Federal Circuit has articulated, is to permit the agency to get rid of only those totally meritless filings that every federal agency sees. If you move beyond the totally meritless, then it seems to me, you've got a well-grounded claim, triggering the duty to assist, et cetera, et cetera, et cetera.

I sense that this Court has mastered a lot of the lessons of *Hensley*, the Federal Circuit well-grounded claim case, in a series of three decisions which just came up in the month of July, the *Teten* decision, the *Harth* decision and the *Beck* decision, all decided within a few days of each other.

I see another development that I didn't see the very first time I addressed this conference. Now, what I don't see may be buried in the single judge opinions which, quite frankly, have gotten to the point where I just can't get my hands around them anymore. But what I do see is a sharp reduction in reversals for reasons or bases, and I think that says two things.

First of all, I think it suggests that the Board is starting to master the amount of information and the amount of data and the writing of Board decisions that satisfy this court in terms of reasons and bases, and I think the constant harping on that point by this court has probably caused the Board to sharpen and to enhance its efforts along those lines.

Where do we stand? I think this court is doing a good job. I think, over the last ten years, the Court has developed a solid, profound body of jurisprudence on veterans law which we had simply never seen before, and by which veterans are far better off.

Do we have a long ways to go? The answer is, yes, of course.

And what I want to do now is go over to my laptop and talk a little bit about one of the most dramatic developments in veterans jurisprudence that I think I've seen come along in any federal appellate system, namely, the Federal Circuit's revolution in veterans law.

I hope that everybody will be able to see my Powerpoint. To the extent that you have any visual problems, this is not in my materials. But if you would like a copy of this particular Powerpoint, I have -- and I won some bets on this point -- the simplest e-mail address on the face of the earth: Fox@law.edu.

I'm going to start this presentation with just some statistics and I'm not a statistician, and you ought to be very suspicious any time I put numbers up on the board. My law school will no longer permit me to teach commercial transactions because every time I try to do arithmetic, I get it wrong.

(Laughter.)

PROFESSOR FOX: But what I've tried to do, and it's very elementary, but I think still striking,

is I simply went back for these statistics into the various Vet.App. volumes and I simply counted. And what I counted in each successive volume were the Federal Circuit dispositions of various cases coming out of the CAVC.

And so let's start with 1 Vet.App. Notice cases in that volume taken to the Federal Circuit: 19 affirmed or dismissed, none -- zero -- vacated or reversed.

In 2 Vet.App., 22 to nothing. In 3 Vet.App., 21 to two, but those two cases were table decisions, which you really can't make much of because they're not full opinions out of the Federal Circuit. So it's hard to say exactly what happened to those two.

In 4 Vet.App., 29 to one, and that one, once again, was a table decision.

Now, it was about this volume of this Vet.App., where the Paralyzed Veterans of America made me the veterans law scholar and gave me the grant to produce my first book on the Court of Veterans Appeals, and I looked at these statistics up through 4 Vet.App., and I more or less concluded, stupidly as we can see now, that the Federal Circuit just didn't care about this court, that the Federal Circuit was just going to take a totally hands-off attitude, that the Federal Circuit was either going to ignore or handle very casually anything that came to them, and as a consequence, I thought for a number of years that the Federal Circuit was going to be a virtual nonentity in this area.

There's a parallel to it. The Federal Energy Regulatory Commission, a number of years ago, was given, by statute, certain appellate authority over some things that came out of the Department of Energy. The ALJ's at FERC hated those cases. They didn't want to learn the law. They tried to avoid them as much as possible, and every session of Congress, they tried to give that jurisdiction back.

I'll swear, as nearly as I could follow it, that I was going to see a parade of Federal Circuit judges going onto Capitol Hill about this time, about 4 Vet.App., begging to be relieved of any appellate responsibilities for the then Court of Veterans Appeals.

Well, they didn't. And now, notice what happens strictly as a statistical matter.

We're continuing the trend. 59 to two, in 6 Vet.App., but notice these two for the first time in 6 Vet.App. are not table decisions. That is, we've got two reversals on full opinion.

In 7 Vet.App., a little bit of a breakthrough occurring here. 98 to 11, only seven of which are table decisions.

In 8 Vet.App., 54 to one. That was kind of a backsliding, I guess. It was 39 to two in 9 Vet.App. In 10 Vet.App., 60 to six, four of which are table decisions. In 11 Vet.App., 45 to nine, only four of which are table.

In 12 Vet.App. This is weird, and I can't figure it --

(Laughter.)

PROFESSOR FOX: I have been through 12 Vet.App., page by page, seven separate times as I was putting here this Powerpoint, and I don't know where the cases have gone. All I can tell you is these are the only cases brought to the Federal Circuit that are reported in 12 Vet.App.

It just I think has something to do with the timing by which West publishes things and gets their act together and things like that.

But four affirmed or dismissed, two reversed or vacated.

13 Vet.App., through the July advance sheet, to six.

Now, even so, you are statistically in a situation, taking a case to the Federal Circuit, of knowing that, statistically, you're probably not going to get a change in the CAVC's decision as you take it up on appeal to the Federal Circuit, but statistics don't tell you the whole story.

I see, statistically, an increase in reversals and vacating, but it's not a significant enough increase to make a statistical case for what I'm trying to say. So what I'd like to do now is go to a chronological exposition of Federal Circuit activity in this area.

Notice in 1994, I found these cases, *Aronson, Jenson, Cromley, Smith, Matter of Wick* and *Jones,* Federal Circuit full opinion cases that have reversed or vacated a CAVC decision.

Now, what I have done is a little editorializing here because my editorializing makes an entirely different point.

It's not just significant that the Federal Circuit reverses this court, but what I was looking for was the orientation or the impact of the reversal. So what I've done by the way of editorializing is I've worked up a couple of little abbreviations. PV stands for "pro veteran."

I don't mean that in an etiological sense. What I mean by "pro veteran" is, as I read this case, this is a case which enhances a veteran's prospect of success in his or her claim.

I'm not sure I want to take it much further than that. To the extent I have a question mark, and I have two question marks up here on the board, those seem to me to be essentially neutral with regard to my pro-veteran or anti-veteran bias of the case.

And what you'll see, of course, a little bit later on in *Smith v. Brown,* for example, is the abbreviation, AV, which stands for "anti-veteran." And *Smith,* of course, as you know, we had the reversal by legislation, rather than by case law.

But, notice even in 1994, several of these cases I evaluate as pro-veteran reversals of a CAVC decision.

In 1995, none that I can find. In 1996, *Collette v. Brown* and *Ephraim v. Brown,* both pro-veterans. And, here, for the first time in 1996, you start seeing the Federal Circuit, in my opinion, actually altering the jurisprudence of this court, altering it in very, very important ways.

In 1997, *Tallman*, an educational benefits repayment case which is probably significant more for the claimants than anything else, but *Grantham* and *Barrera*. All three cases I evaluate as pro-veteran dispositions.

In 1998, *Jones*, *Collaro*, *Bazalo*, *Hodge*, and *Bailey*, and I think this is the year, '98, when we can start speaking profoundly about the Federal Circuit revolution in veterans jurisprudence.

And, once again, with the exception of *Jones v. West*, I gauge each of those decisions as pro-veteran; that is, the Federal Circuit expanding or enhancing a veteran's access to benefits and prospects of success in contrast to the CAVC decision that was reversed by the Federal Circuit.

In 1999, *Linville*, *Hayre*, and *Maggitt*. Again, three very profound cases, all PV.

And then, finally, and notice we're not quite finished with the year 2000, *D'Amico*, *Brown*, *Hensley*, *Schroeder*, and *Winters*, all PV, and all instances where the Federal Circuit is really making its mark on veterans claims law.

It might be hyperbole for me to talk about a revolution. Quite frankly, it's probably an evolution.

The Federal Circuit was a long time coming to where they are now, and remember back in '94, '95, I had pretty much given up on the Federal Circuit as an important player in veterans claims law. I've completely changed my mind, and as a consequence, I think particularly for veterans' advocates, for claimants' representatives, the Federal Circuit is now a pretty good place to be.

Okay. So far, so good on that. Notice my summary, which I think is even more profound than my slide-by-slide presentation. Between '94 and July, 2000, 23 Federal Circuit reversals or vacatings of CAVC decisions.

I gauge two as anti-veteran, two as neutral, and 19 as pro-veteran. Once again, for a claimant's representative, I think the Federal Circuit is a better and better place to be these days.

You also shouldn't just depend on statistics. What I'm also seeing and what I'm also studying as closely as I can is the actual language of those opinions. And, invariably in my PV cases, what I see is a constant harping on the nature and basis of this administrative system.

This is, by statute and by philosophy and by policy, a pro-veteran's administrative system. It is a system in which the veterans get the benefit of the doubt, in which veterans are supposed to be assisted by the department.

And, to that extent, that is, to the extent that the Federal Circuit never loses this focus, I see it remaining an important player for the years to come.

Now, what I want to do now, because in years past, I haven't thought we heard a lot of time for colloquy and various other things, is I'd like to come back to that anecdotal history of the Court that Judge Nebeker has asked me to undertake, because one of the things I found when I was an appellate law clerk is I had to spend hours and days reminding myself, because as you know, appellate clerks

see only pieces of paper for the most part, that these are real human beings whose lives I was affecting.

Now, granted, I was like all law clerks back then. I thought I decided the cases and my judge was merely just really kind of peripheral to the process.

(Laughter.)

PROFESSOR FOX: I don't know what he would say about that, but I suspect I wasn't quite as good as I thought I was.

At any rate we deal with a system that affects human beings. And one of the things I'm trying to do in the anecdotal history is put a human face on this process. What I'd like to do now is show you the human face who has probably had as profound an effect on veterans benefit law as any claimant that I can think of.

Let me move to that and give you an idea of what's going on. These are some photographs provided by counsel for the person whose photo I'm going to show you, my good friend and former student, Mike Hannon.

Ladies and gentlemen, this is Fred Gardner. Kind of hard to see there, and I deliberately cropped that photograph. This is Fred Gardner post *Brown v. Gardner*, after the Supreme Court's mandate is issued.

And you'll recall that the Veterans' Administration, through several years of the basic administrative process, and the Department of Veterans Affairs, through several years of the VJRA appellate process, constantly stood in his way. "No, no, no, no, no," was essentially the DVA's answer to Fred's request for benefits.

Immediately after the mandate issued, this is what happened:

(Laughter.)

PROFESSOR FOX: The Department of Veterans Affairs flew the Secretary out to Fred's home, set up a double-wide trailer, configured like the Secretary of Veterans Affairs' office, and proceeded to show how kind they are.

(Laughter.)

PROFESSOR FOX: This is the Secretary with his arm around Fred. This is the Secretary explaining to Fred, Fred's post-*Brown v. Gardner* benefits --

(Laughter.)

PROFESSOR FOX: -- which I suspect, knowing Mike Hannon and how precise a lawyer he is, was fully explained to him well before the Secretary got out to Texas.

I quote and finish with the words of my good friend, Judge Nebeker. One of the most profound things he ever said to me as I got to know him is this:

No matter what we do or say, no matter how angry we can get, one of the characteristics of the Department of Veterans Affairs is that it is a good loser. This is probably a perfect example of it.

In the anecdotal history, there will be some more pictures, some more claimants, some more stories like this.

Fred is very grateful. He took his back benefits and he went out and bought a small farm in Texas, on which he currently resides. He seems to be getting along okay. He's a Korean War veteran, so he's not young, and he, for all the shenanigans that he had to go through, is not terribly unhappy with what all of the courts in this process have done for him.

I am authorized to thank you, the United States Court of Appeals for Veterans Claims, and the Federal Circuit, and the Supreme Court of the United States for what you did on behalf of Fred P. Gardner.

Thank you.

(Applause.)

PROFESSOR FOX: I think as a logistical matter, since I suspect that people have things to say, and I feel happy that we have a little bit more time this afternoon than normal for doing that, that if there are some questions, we do them now. But we also have some protocol and some special things that are going to go on as soon as I sit down and shut up. So it might be a good idea to keep your questions as short and quick as possible, and we'll then get to the other ceremonial aspects of the program.

MR. O'REILLY: (Inaudible) have to say that you disagree with the aspects of the paper that I presented and with the change in the structure. And I wondered if you could share a few comments.

PROFESSOR FOX: No. This -- for those of you don't know him, is Professor James O'Reilly from the University of Cincinnati.

Let me get this thing off. I don't necessarily disagree with what Professor O'Reilly has said. He was kind enough to send me an early version of his paper, and I have to confess that if I were permitted to write on a blank sheet of paper, as I think he said in the breakout sessions, I would not set up the system we currently have.

I have said probably 50 times in this gathering that a sophisticated administrative benefits process which excludes attorneys is fundamentally flawed. That is not to take away anything from those exceptionally dedicated VSO people that I have run into and interviewed for the purposes of my Board report. Those people are doing exceptional work in this claims system.

But there is no other federal benefits system that excludes lawyers, and I think that is simply

wrong.

My problem, and that's why I welcome Jim O'Reilly here today, is that coming into the system, I took an incremental approach; that is, I kind of nibbled at the fringes of so much of the things that we do where, as he put it this morning and this afternoon, some drastic changes may be necessary.

Can we get those drastic changes through Congress? I don't know.

Will we probably have to live with the existing system for the short run, if not the mid run, if not the foreseeable future? I have a funny feeling the answer is going to be "yes."

But Professor O'Reilly makes a very good point, and I suspect it's pretty much his bottom line. There is no federal benefits administration system exactly like this. Most other federal benefits administration systems function more efficiently and better with regard to cost benefit, and probably better with regard to claimant satisfaction. And, as a consequence, we really need to think about a lot of the profound suggestions that he made.

So, no, Jim. I don't necessarily agree at all. I come to it from a slightly different direction. That's all.

AUDIENCE MEMBER: My question is, could it be that what you're seeing facts of (inaudible) are the result of joint remand rather than the fact that (inaudible).

PROFESSOR FOX: Oh, sure. There is -- and I could have spent another 45 minutes on this. Like every other appellate system, we're dealing only with the tip of the iceberg. And there is so much that is simply unseen that you all deal with every single day of the week that I do not.

I suspect that joint remands have a great deal to do with why we don't see a lot of formal written opinions remanding for reasons or bases these days. And once again, as I do almost every year, I commend the Central Legal Staff, which does first-rate work in a setting that I suppose the law professors would call "court-annexed alternative dispute resolution." I think the Central Legal Staff deserves a great deal of credit.

Okay. I think my friend, Judge Greene, is going to take over and go on with the rest of the program.

JUDGE GREENE: I pass to Judge Ivers.

PROFESSOR FOX: Oh, Judge Ivers? All right. Good. Thank you.

(Applause.)

JUDGE IVERS: Professor Fox, thank you, very much, and on behalf of the Court and the staff, I want to present you with this little memento of your time here and your efforts, which we appreciate very much.

PROFESSOR FOX: Thank you very much, Judge.

JUDGE IVERS: Thank you.

(Applause.)

JUDGE GREENE: You're on my time now. I gave you a little bit this morning, and if you look at your program, you say, "Well, this is it." Well, that's not quite true. We've got a couple of things I want to do.

The General Counsel of the VA has asked that she be given not equal time, necessarily, but an opportunity to say a few remarks in reference to some comments that were made this morning.

Before she does that, however, I want to recognize a very distinguished person who is amongst our midst at this time, probably the person who is responsible for the success of the 47 years of federal service that Judge Nebeker has been able to enjoy, and that's Mrs. Lou Nebeker, his lovely wife.

(Applause.)

JUDGE GREENE: After the General Counsel speaks, remain seated for a few more moments. I have a couple of awards I want to present, and then we'll be able to go to the reception.

MS. BRADLEY: I'm sort of treating this like an oral argument.

First, I want to thank you, Judge Nebeker, for your service to our country, and particularly to this court. You've brought great stature to the court, and obviously, you have generated a significant amount of interest in advocacy for our veterans, and we all appreciate that.

Having said that, I want to respectfully disagree with something that you said this morning.

Apparently, my predecessor had come before this body several years ago and had talked about regulatory reform. And I assume that she made certain commitments about the speed with which that would take place, and you concluded your remarks this morning by saying that, at least in your view, regulatory reform in our department, the Department of Veterans Affairs, is dead.

And I just couldn't let that go without a response because that couldn't be farther from the truth.

Now, I will say this: Regulatory reform has not been taking place at the pace I would like, or that other VA leaders would like. But regulatory reform is, ladies and gentlemen, alive and well at VA, and it is a commitment that I've made, and I know a number of other leaders in our department have made.

I think that it really is the linchpin of our future. And I wanted just to give you a few examples.

I don't think that we should get any awards or decorations for what we've done, but we are

committed to the process and I wanted to just spend maybe two minutes to tell you a little bit about it.

Back in 1998, in fact, when I was first brought on board as the GC, I got a briefing, and what I was told was that back in 1994, OMB had said publicly that VA was the worst agency of all Federal agencies in terms of the quality of its rule making.

And, today, I can tell you, not always, not without exception, but we are praised and cited oftentimes by OMB as having some of the best regs in the Federal Government.

I wanted to give you some examples of reg reform. As you all know, a lot of the regulatory work we do wouldn't qualify, per se, as regulatory reform. So when I went back to the office, I got a sampling of some of the regulations that I believe demonstrate our commitment to regulatory reform.

First, in the area of the Veterans Health Administration. We have promulgated a number of regulations, including those that govern nursing home care, which have been rewritten, and are totally in effect and on the streets.

Adult day health care: also totally written, published, and on the streets.

Our construction regs have already been rewritten, and now are in the coordination process.

With respect to VA charges and payments for health care, we have promulgated a reasonable charges regulations, which is basically what VA charges insurance companies); that's in effect.

We've published a regulation that governs the payment to fee-basis physicians, and also with respect to co-payment regs, that is, the co-payments charged veterans for non-service-connected care. That one is almost finished.

Now, I know a lot of you in this room say, "Well, Leigh, maybe you're doing a stellar job in the area of veterans health care, but what about the Veterans Benefit Administration? What have you been doing to partner with them?"

Here is a quick rundown. In the area of insurance, we are rewriting all of the regs in plain language. That project is partly finished.

With respect to voc rehab and employment, we are well along our way on a total rewrite of the regs.

In our education service, we are working on a major Chapter 35 rewrite, and that, of course, governs eligibility and work standards.

Now, what is the one area that I'm most frustrated with, and I suspect you, too, are frustrated with?

That's in the area of C&P. And I believe that our Undersecretary for Benefits, Joe Thompson, talked to you a little bit about the commitment that he has to our reg rewrite project.

Let me just give you a quick -- it's almost a silly story, but Jack Thompson, the Deputy General Counsel of VA, and I had been wracking our brains, trying to figure out a way to get people more motivated and committed to work closer together and to work more quickly.

And this, again, sounds silly, but we've done things like invite all of the participants in, bought pizzas and drinks and salads, and told them, you know, to "Eat to your heart's content, and then get back to work."

And we're trying to do different things like that to really set a tone that this is a priority for us, and not just for Jack and Leigh, but for all the leadership of VA.

So I'm sure I sound a bit defensive, Judge Nebeker, but I just wanted to let you know that there are a number of us who are committed to these initiatives.

I think that our future rests on our success, and so while our pace has not been what I would hope, I understand that you all are frustrated. And when you want to push us and prod us and do whatever else it is you think you need to do to get us to go a little faster, I encourage you to do that. I think that we can use your help as we continue down this path.

So I just wanted to make those remarks. And if any of you have any particular questions about a regulation, the status of it or what we're doing or how we're involving you, please see me and Jack afterward, and we'd be happy to talk to you about it.

(Applause.)

JUDGE GREENE: Thank you very much, Ms. Bradley.

Before I came to the Court, this Court decided that it would -- at its Third Judicial Conference, I recall, establish a Distinguished Service Award, given to a person or group of persons outside the Court whose service to the Court has been outstanding. The award was not meant to be an annual event. It was only to be given for service of the highest merit.

In November, 1996, the award was renamed in the honor of Judge Hart T. Mankin.

In April, the Board of Judges decided that this was a time to give out the award again, and in doing so, we had to look at the revolution or the evolution of what was happening in the area of veterans jurisprudence.

And one thing kept coming back to us, and that was, from the time of the Court's inception until, as Bob Comeau mentioned to you today, the numbers of our veterans who are now represented before the Court has become significant. Where it used to be 80 percent throughout perhaps the process, you heard Bob's comment this morning that we're at the lowest number ever of veterans remaining unrepresented through disposition.

Of the 170-some registrants who were here who are private attorneys, you all are to be commended for your commitment to our veterans.

But the Board decided that there was one group that perhaps took the lead, if you will, brought together many attorneys across the country who would, in fact, be able to represent veterans before this court. I speak of none other than the National Organization of Veterans Advocates.

They provide a valuable service to individuals representing veterans. Among the many services it offers, continuing legal education programs in the form of recent court decisions and legislative updates, in order to provide successful advocacy before this court, and perhaps before the Federal Circuit.

I know that in the past three years, I've seen tremendous activity by NOVA, and as a result, my colleagues and I have determined that as we approach and continue to blaze trails within the new millennium, NOVA will continue to lead the trail for veterans, and we can rest assured that the veteran has his day in court.

Chief Judge, I would like to call upon you now to assist me in presenting this award to the National Organization of Veterans Advocates, and I ask Mr. Bob Chisholm to come forward.

(A brief pause.)

JUDGE GREENE: Mr. Chisholm, this award reads, "The United States Court of Appeals for Veterans Claims, Hart T. Mankin Distinguished Service Award presented to the National Organization of Veterans Advocates.

"In recognition of exemplary service to the United States Court of Appeals for Veterans Claims, through its dedicated and zealous representation of veterans before the Court."

It bears my signature, dated September 18 of the year, 2000, and I am proud to present it to you, sir.

MR. CHISHOLM: Thank you very much.

(Applause.)

MR. CHISHOLM: Thank you, Judge Greene and thank you, Judge Nebeker, on behalf of the Board of NOVA and the members of the Board, we graciously accept this Distinguished Service Award, and we hope we can continue to provide continuing legal education to members of our organization, as well as members of the bar, as a whole. Thank you.

(Applause.)

JUDGE GREENE: Also, during the Third Judicial Conference, this court established the Outstanding Achievement Award to recognize exceptional service to the Court by an individual who is a member of the Court staff. As you have noticed, they all worked very, very hard.

There is one person who, if she were not here, I think we would all panic, simply stated, because it's at the end of the fiscal year, and she does so many other things. And at this time, I would like

to ask her to come forward and receive this Outstanding Achievement Award, Ms. Darlene Haakinson.

(Applause.)

JUDGE GREENE: Darlene joined the Court on September 3rd, 1989. For the last 11 years, she has served as part of the Court's administrative team as the Procurement and Telecommunications Specialist.

In addition to her regular duties, Darlene has been part of a very small administrative committee with very large responsibilities, the planning, organizing, and orchestrating of the court's judicial conference.

She has worked on every conference since 1992. The judicial conference falls at the end of the fiscal year, as I indicated, when her job as a Procurement Specialist gets even more hectic.

However, as she has done with every conference, she has worked tirelessly on the conference logistics, including acting as the registrar, working with the hotel, arranging for the audio-visual needs, working with the printer in preparing the conference materials, and so much more.

The sad news -- I'm beginning to get a little nervous about this as the junior judge -- she's retiring after the first of the year.

I asked my co-chairman of the conference to come up with a nominating committee to recommend someone for this award, and it was a unanimous decision, one that the Board of Judges welcomed very much. Therefore, I call upon the Chief to present this award.

CHIEF JUDGE NEBEKER: Darlene, this award reads, "The United States Court of Appeals for Veterans Claims Outstanding Achievement Award presented to Darlene Haakinson in recognition of exemplary performance in the planning and administrative coordination of the court's judicial conference," dated September 18 of the year 2000, with my signature.

Darlene, a special thanks from me.

MS. HAAKINSON: Thank you, both.

(Applause.)

MS. HAAKINSON: I'm rather shy, but I want to thank the Chief and the Board of Judges, and especially Marlene, for this wonderful award. Thank you.

(Applause.)

JUDGE GREENE: Bear with me just a little longer, please.

Bart Stichman, you have the floor.

MR. STICHMAN: Thank you, Judge. It's my honor to present, on behalf of six organizations, the American Legion, the Disabled American Veterans, the National Organization of Veterans Advocates, the National Veterans Legal Services Program, Paralyzed Veterans of America and Vietnam Veterans of America, this tribute to the first Chief Judge of this court, Frank Q. Nebeker, upon his imminent retirement from the Court.

If one were to review the briefs these organizations have filed recently at the Federal Circuit challenging the precedents of this court, one might conclude that these six organizations don't hold this court or Chief Judge Nebeker in high esteem.

These organizations are not so myopic. They each have written to you letters of tribute that speak to their deep gratitude for all you have done to make judicial review a success.

Some of the common themes in the letters are that we all were quite uncertain as to what the impact of the Court would be back in 1988 when Congress created it. There was no certainty that President Bush would appoint judges of independence from the agency, who were experienced in the law and were serious about their role as judges on this new court.

The second theme is their appreciation of how formidable the challenges were that you faced when you became the first Chief Judge: establishing a court that had no antecedent, interpreting a complex set of statutes and regulations without previous judicial interpretation, and effectively asserting authority over a bureaucracy that for decades had not been subject to judicial review.

The end result, we all agree, is that the Court's work has caused a change in the way the VA administrative process is operated to make it infinitely more fair to the benefit of thousands of disabled veterans and their families.

These six organizations are especially appreciative of the Chief Judge's role in making this court user-friendly for practitioners, and your proactive efforts to address the pro se problem the Court has experienced from the outset.

Now, we know that your long career of public service is not at an end, and that part of that long public service has been on the D.C. Court of Appeals, but we think the evidence of record is already clear enough to say that when your long career is over that the most enduring and significant part of your public service will be your years as the first Chief Judge of the Court.

Congratulations, and we wish you and your family all the best in your future endeavors.

(Applause.)

CHIEF JUDGE NEBEKER: Thank you so much, all of you. Gee, it's such a surprise, I'm tempted to say I'll try another retirement.

(Laughter.)

CHIEF JUDGE NEBEKER: Before I step down, after my thanks, for the efforts put into this

presentation, and my good friend, Bart Stichman, I would like -- excuse me. I seem to be coming down with another cold.

I would like to acknowledge the presence of a man here who has been my mentor for at least since 1960, Mort Hollander.

Will you stand, Mort?

(Applause.)

CHIEF JUDGE NEBEKER: I asked Mort specifically to come because I did want to acknowledge the service that he has performed. When I say he was my mentor, I meant that he was at the Department of Justice when I was in the United States Attorney's Office, and he was in the Civil Division. And whenever I was upset about a decision of the court, I would call Mort, because we had to go through him in order to get further review. As a result, I've become an admirer of Mort.

When the Court got started and he was retired, he immediately came forward and has done yeoman work for our court, and the court owes him a debt of gratitude.

Now, thank you all for this wonderful tribute and for hearing me. The many times that I have spoken here, I have not tried to be confrontational, but I've tried to say it as I saw it. Thank you.

(Applause.)

JUDGE GREENE: One more and that's the Chief-in-Waiting, Judge Ken Kramer.

JUDGE KRAMER: I recognize that I'm the only thing separating you from the food, and I will proceed accordingly.

I have some bad news and I have some good news. The bad news is, Darlene will be the last recipient of the Outstanding Achievement Award. Now, the good news is that the next recipient of that award will have the honor of having bestowed upon him or her the Frank Q. Nebeker Outstanding Achievement Award.

(Applause.)

JUDGE GREENE: There's payment for the reception. That payment is that you drop your evaluation form off before you go, and then you'll have a chance, yourself, to personally greet Chief Judge Nebeker at this conference. Thank you.

September 19, 2000

FOURTH PLENARY SESSION

JUDGE GREENE: As I look around the room and I see many empty seats, I don't know whether it's because you're still getting coffee, or you stayed up to watch the Redskins play the Cowboys. And if you're a Washington fan, maybe you just decided not to come in at all. That team cost a lot of money, for those of you who have season tickets.

I have a couple of administrative announcements. I did give you time this morning, which I'll take back towards the end of the day as we go into Professor Myers' presentation. But I have some administrative announcements to make at this time.

First, Judge Holdaway has informed me that yesterday he had an -- an Economist magazine that he had outside and someone apparently took it.

(Laughter.)

JUDGE GREENE: And he had Professor Fox's autograph on it.

(Laughter.)

JUDGE GREENE: So whoever is doing some financial planning right now, would you please see Judge Holdaway. And on a more serious note, Mr. Farber, are you here?

(No response.)

JUDGE GREENE: I guess he is not. He's probably -- if anyone did find that binder and gave it back to him, it's very much appreciated by him I'm sure.

I'd like for Jamie Mueller to come forward for the other administrative announcements.

MS. MUELLER: Good morning. Welcome back. Of course, we have the usual announcements. If you want CLE credits, see John Nichols. We would like you to fill out your evaluations, of course. They're in the front pocket, one for each day. Please don't forget.

Now, we had an oral argument scheduled for this afternoon and it has been canceled, for those of you that were planning to go. On the registration desk is an updated list of the participants at this conference, if you would like one. On your table should be a more reader-friendly version of Colonel Myers' ethics session this afternoon. There is one in your book, but this one is formatted a little differently, although they have the exact same words on them. We might not have distributed them exactly the way you're seated, so I trust you to get them to whomever needs them. And have a good day.

JUDGE GREENE: Application and enforcement of the Court's Procedural Rules. This is a plenary session that's moderated by Mrs. Sandra Montrose, the Executive Attorney to the Chief Judge. Her biography is at Tab H. It speaks for itself. But more importantly, she has been a mainstay at this Court since its inception and brings to the Court a great deal of experience. We rely upon her very much.

I had the pleasure of first meeting her when she attended my confirmation hearing, and that tells you the types of responsibilities that she has. Her duties are not solely confined to the chambers, but also she's involved with outreach of the Court and legislative matters.

So without any further adieu, I will call upon Sandy to introduce the other panelists.

MS. MONTROSE: Thank you, Judge Greene. We're fortunate in having as members of our panel, three very distinguished practitioners before the Court. They're notable, not only for their competence and their zealous and effective representation of their clients, but for their civility to their adversaries and the Court staff. So we very much appreciate having them with us today.

First, we have Barbara Cook, who is a graduate of the University of Michigan School of Law. She clerked in the Federal District Court and she's one of our very earliest practitioners in veterans benefits law. She began to practice before the Court in 1993. She is a member of the Board of the National Organization of Veterans' Advocates.

Joan Moriarty received her law degree from Western New England College of Law, where she served as articles editor of the law review. She had been with VA Professional Staff Group II, before coming to Group VII, where she is now a supervisory attorney. She is a member of the Court's Rules Advisory Committee.

Ronald Smith is Chief Appellate Counsel for the Disabled American Veterans and worked initially in the Veterans Administrative Office of Inspector General. He has been practicing over the past 11 years, that is, since practically day one of the Court's existence, before the Court. He served as President of the Federal Circuit Bar Association and Past Chair of the Federal Bar Association veterans law section. He has also served on the Court's Rules Advisory Committee. He has lectured throughout the United States on veterans law topics.

We have selected a list of questions from the members of the Bar and we want to thank those of you who submitted questions to us. Now, our topic is the Court's enforcement of its Rules of Practice and Procedure. And some of the questions were very interesting, but were not within that subject-matter area. Please do not feel we ignored them. We did channel them to the moderators and to the panelists in the breakout sessions, whose subject matter they did relate to.

But we have organized several topics around the questions that we did receive relating to our subject matter, enforcement of the Court's Rules of Practice and Procedure, and if we have time at the end, we'll be happy to take additional questions on that subject. But the questions we received, as well as the analysis made by the panel members, falls into several groups, so those are the topics that we're going to address.

First of all, briefs and forms of the briefs; second, extensions, motions for extensions of time; third, sanctions and remedy, where there is a lack of compliance with the rules; fourth, practitioner proficiency, and I've added civility, because that also seems to go hand-in-hand; fifth, rules relating to the process of the designation of the record, the counterdesignation of the record, and the record on appeal.

We also would like to make a few comments, time permitting, on the Eighth Circuit's recent case on citation of cases that have been identified as non-citeable by the issuing court, that's the *Anastosoff* case.

So without any further ado, we had hoped to conduct this as a dialogue, but I'm not sure whether this microphone, which has a nice long cord, can be removed from the stand.

(Judge Greene helps Ms. Montrose.)

(Laughter.)

MS. MONTROSE: I guess I'm more technologically challenged than I thought. When all else fails, give it a yank, and it didn't even need a very hard one.

So I will turn the microphone over, in the first instance to Ron Smith.

(Laughter.)

MR. SMITH: Thank you, Judge Greene. In your binders, you will find at Tab H, some of you may have already seen it, a short paper that I have prepared for the conference. And it's always a problem when you start categorizing people, but I think I can probably put everyone in this room into one of two categories: The minority of you who have read that paper, and the majority of you who have not. And I have excellent news for both groups. I will not be reading that paper from this lectern this morning.

Over the past nearly 11 years, I think it's fair to say that the Court has engaged in relatively sparse enforcement of its rules. Now, that means obviously that there has been some enforcement, but not a great deal.

The thesis that I would like to propose is that the extent to which a rule, any rule, is not respected by the parties, undermines the respect for all the rules, and that the rules are there to serve a purpose. Primarily they are there to serve the Court, but they also serve the parties and they serve our clients. And therefore, there is an important reason why the rules should be enforced.

Now, does the sparse enforcement by the Court mean that there is no problem with this Bar observing the rules at all times? I think the evidence is not very much in dispute. The rules are generally followed, but there are some notable exceptions.

First of all, I would like to point out that rules regarding such simple matters as the form of pleadings filed with the Court are occasionally not followed. For example, I would point to the organization of briefs. I have seen briefs prepared by both sides, where mandatory sections required under the Court's rules are not presented, where if the sections are all there, they're not in the order prescribed by the rules. In some cases, we take it upon ourselves to add new sections to the brief not called for, which might otherwise appropriately be included in the argument section, but they're not. Such simple things as the layout of a brief, margins are not what they're supposed to be, typefaces are not conforming, type pitch is incorrect.

With respect to motions, there have been instances when I have learned of motions only when I receive them from the other side, and I have seen them go the other way as well, where the moving party fails to inform the Court whether or not the motion is consented to or opposed; if opposed, whether or not a written opposition will be filed; and if the other party cannot be reached, what efforts were made to find out whether the non-moving party did consent or oppose the motion. So there are clearly some places where the rules are not enforced.

Probably the most glaring problem area is with respect to motions for extension of time. Now, the rules require that in order to obtain an extension of time, a motion must be filed and that motion must present good cause. I suggest the evidence demonstrates that any party can, in fact, obtain an extension of time, not only without good cause, but with no cause whatsoever.

Now, how would that come about? Well, the practice has evolved in this Court that motions for extension of time are regularly, if not generally, filed on the day on which the pleading is due. So consider a hypothetical where a motion is filed and presents no cause, it simply says, "Move for an extension of 30 days," and let's, for the purposes of this example, assume that the motion is opposed. Within the 14 days allowed under the rules, the non-moving party files an opposition. And let's further assume, the extraordinary situation where the Court denies the motion. Almost uniformly, the Court will permit the moving party a short period of time in which to file the pleading. So having presented no cause whatsoever, having moved on the last day, I have successfully obtained an extension of time, without presenting any cause whatsoever.

Why would this happen? Why would the Court not take action to enforce its rules in such circumstances? Well, one of the first things that could be done, is that we could have a rule which would allow the clerk to return a pleading to the party filing that pleading, where it did not conform to the rules. This would not involve an exercise of discretion by the clerk, but rather things that we can look for and easily measure, for example, the typeface is wrong, the party did not contact the other side, there wasn't proper service, those types of things. And the rule could further provide that the party filing such a paper would be allowed a short period of time, it could be ten days, for example, to file a corrected pleading. And if the corrected pleading came in within the time allowed, then that pleading would be treated as timely filed.

Now, other courts, the Federal Circuit is an example, have a similar rule and they require that the pleading that comes in to replace the defective pleading must be labeled as "corrected." And I assert that merely having such a rule would cause me, and I suspect everybody in this room, to strive even more diligently to comply with the rules in all circumstances, because we would not want our names associated with a pleading that was labeled on its face as "corrected." So that's one possibility.

What are some of the other possibilities? Well, I suggest in the paper that I have presented, that the Court could simply take note of the fact that a party had failed to follow the rules in some respect. My paper suggests that the Court could mention the failure in a footnote -- sorry, Chief.

(Laughter.)

MR. SMITH: Having reconsidered that matter however, I now believe that it could equally well be taken up in the text of the opinion.

(Laughter.)

MR. SMITH: I certainly wouldn't want one of my cases to have such a mention, whether the opinion was published or not. And I would further suggest, that an even sterner sanction might be imposed in a case where serious or repeated violations had occurred: the Court could mention the name of the attorney in its opinion. Now, I certainly would want to avoid that and I'm sure you would, too.

Why mention this? Well, we all know exactly what the Court should do in the case where the other side violates the rules. In the case of appellants' counsel violating the rules, a clear response from the Court should be that the attorney should be disbarred, until such time as he or she purges himself or herself of their contempt. And if the government does it, the clear response should be treble attorney fees as damages, paid to appellants' counsel.

The reason we don't have that happening, of course, is that it is totally inappropriate and much too stern a sanction. I think that the Court needs to have these other options available to it and to exercise them from time to time, and in doing so, it would achieve the goals.

I would like to make two points in closing with respect to motions for extension of time, one in defense of appellant's counsel, and one in defense of VA counsel. I have had a number of cases where we have been working with VA in an effort to reach an agreement on either a joint motion for remand, or to settle a case.

As appellant's counsel, my brief is due first. So while these discussions are going on, the time for filing my brief is running. And I have been in the position where I have had to move for one, two and even three extensions, because the parties aren't yet ready, or have not been able to reach agreement on the resolution.

I don't want to start working on my brief at that point. Because in the overwhelming majority of cases, there have only been a few instances where having started down the remand/settlement road with the VA, we have been unable to conclude the agreement. So I don't want to devote the scarce resources of my office to working on a brief that's never going to be filed. Further, I'm not going to include that time in the EAJA application.

And third, there have been a few unfortunate circumstances, where I have been told that if I were to go ahead and file the brief, thereby shifting the burden of proceeding in the briefing schedule to the government, that the government might change its mind about wanting to settle or remand the case. So I would suggest to the Court that all extensions are not the same.

With respect to motions for extension filed by the VA, I would like to say that I have known some of the attorneys in VA General Counsel Group VII, Joan Moriarty among them, for nearly a decade now. And I'd like to address my comments to my colleagues in the veterans bar. These people are hard-working, knowledgeable, professionals. I, like you -- perhaps like you, have not had a case that I can recall in the last year, where the VA Office of General Counsel, filed a brief within the time allowed by the rules. That is not a problem with the attorneys in General Counsel Staff Group VII.

As Chief Judge Nebeker observed several conferences ago, it is the General Counsel of the Department of Veterans Affairs, who has the statutory responsibility to represent the Secretary before the Court. If the General Counsel cannot or will not devote the resources to Group VII that are necessary in order to adequately represent veterans, and if our clients are being adversely affected by that failure, then it is we who should call on Congress to exercise its oversight authority and find out why. The responsibility has been assigned to the General Counsel, and it is she who must bear the burden.

Thank you.

(Applause.)

MS. MONTROSE: We'll follow the time honored pattern for oral argument. I'll call upon the government next and then the other member of the appellants' bar, Barbara Cook, will speak to the same subject.

Before I call upon Joan -- and Joan, if you'd like the microphone there, I'll pass it, now that I know how to get it out of the stand. I'd like to call your attention very briefly to other materials that are at Tab H, along with Ron's paper and a paper that Barbara submitted in consultation with Joan. There is a copy of the Court's Rules of Practice and Procedure. In fact, this is the -- the version that's pulled off the "O" drive, which I believe is available to you through the website, but you won't have to download it and print it for yourself. It's the version that has the latest amendments to the rules.

There is also a copy of the Court's Internal Operating Procedures and Miscellaneous Rule 2-99, which came out of comments that were made at our last conference in '98, the concern of the Bar over precedential opinions being issued where the appellant is not represented by counsel, and the Court's making the opportunity available for counsel to enter an appearance in cases that present an issue that's going to result in precedent.

Now that I have called your attention to what's there, I will hand the microphone over to Joan.

MS. MORIARTY: Thank you, Sandy. I'll try not to strangle Ron as I get around him.

MR. SMITH: I'll bet you'd like to.

MS. MORIARTY: Just sometimes.

(Laughter.)

MS. MORIARTY: Just to address a couple of points that Ron made. As far as an amendment to the rules, to add a new rule that you could return a paper if it does not comply with the Court's rules--I believe that would be unnecessary, because the Court already does enforce problems with briefs or motions that are not filed in compliance with the rules.

There is a recent a per curium order in the *Gantka* case, in which the Court found that the appellant had lodged a brief that exceeded the number of characters per inch and exceeded the page

limit, and that brief was indeed returned. In the *Gantka* case, the Court did return a brief that was not in compliance with the Court's rules, as far as the limit of characters per inch.

And then also in another precedential order, the Court addressed the fact that the appellant's brief exceeded the page limit. In fact, they -- they called it, the brief was "prolix and extreme", was the phrase the Court used. That was another *In the Matter of Keith Snyder v. West*. There have been several -- I'm sorry?

(Interruption.)

MS. MORIARTY: There have been several other mem-decs where the Court has individually addressed the petitioner's -- I mean, appellant's or the Secretary's brief, noting whether or not they met the Court's rules, and have either returned the brief, or as Ron's other suggestion was, they could mention it in the text of the opinion. Well, indeed they have done that in a number of mem-decs such as this. There was a case, *Barber v. West*. As of April, another one, *Cook* -- no relation -- *v. West*, in March 2000, where the Court specifically went through the rules that the appellant's brief did not meet.

So I would suggest that an amendment to the rules, to say that the Court should have authority to either mention it in the context of the opinion, or to return the paper, I would suggest that they are already doing that, so an amendment would not be necessary at this point.

As far as Ron's comments concerning extensions, our office and Group VII has certainly been aware of the problem of extensions and we monitor it closely. In fact, the last year we have had to -- we had been responding to the Court's concerns in the *Ehringer* case, and hopefully the concerns of the Court have been addressed and our extension motions are down.

We try to maintain a fully staffed office, we've been sort of the victim of our own success. We've had a number of attorneys who have found that appellate practice is very marketable, and I can't tell you the number of attorneys we've lost over the last year or so, who have gone -- we lost several very good attorneys up to the Court and out to private practice, and the Department of Justice.

And every time we lose an experienced attorney, it's not just a matter of hiring a new one, trying to get that person up to speed is a time-consuming process, and there were times when we've redistributed cases from attorneys who have left the office. And in fact, we had one bad instance where we lost three in a month, and that amounted to about 120 cases that we needed to redistribute throughout the office.

So as hard as we try to stay up to full staffing capacity, because we've got fairly marketable skills at this point, we lose people, we need to reassign cases and yes, there does come instances where we need to file an extension. However, again, as I have mentioned, we do monitor this and we are very concerned about the extensions and try to make sure that we don't get them, unless we absolutely need to.

Barbara, would you like to --

(Laughter.)

MS. COOK: Well, I think that I would like to start just by noting that I think that one of the strengths of this Court -- and strengths of the clerk's office -- is the user friendly quality of the clerk's office and of the rules. And I'm sure that in part, that is a result of the recognition that so many cases are filed pro se.

But nonetheless, certainly from a practitioner's standpoint, it has been refreshing, and I think helpful in the administration of the court cases, not to have the clerk's office checking my margins to make sure that they are -- I have to say, I don't know the rule off the top of my head, to make sure that they are two inches, as opposed to one and seven-eighths inches, or to check the type size to make sure that it's 11 point instead of whatever the next size smaller would be.

Certainly, anyone who has practiced in other courts has had the experience or heard the stories of having briefs returned or motions returned for what appear to be minute violations of the rules. And I would be disheartened if this -- if the Court adopted an approach, because I think that we're all in agreement that the ultimate goal of the rules is for the smooth administration of the cases, and to get the cases decided in as an efficient and justice-based manner as possible.

We've already heard yesterday about the length of time that it's continuing to take and that that is just being added to, in part by the increased filings and other -- you know, very understandable reasons for -- for it. Nonetheless, anything that's going to further delay the cases, I think is in no one's interest. And so I -- in that sense, I agree, Joan, with you, that I don't know that a court rule is necessary. Certainly the Court is quite capable, as you have aptly pointed out, of enforcing its rules in an egregious situation. So -- so in terms of the -- those kinds of problems, I think that we can -- can continue to trust that the Court will do that.

I think though it's also helpful to understand why sometimes the rules may be violated. And I think that the rules are clear. I don't think that it's a matter of people not understanding. At least I hope that's not the case from an attorney standpoint. But I know that on page limits, that there is some concern among private practitioners that the page limit is -- is too short. And I did have Sandy attach the rule from the Federal Rules of Appellate Procedure, which allows for additional pages beyond what this Court allows.

And I don't think that people exceeding the page limit is just people being verbose. I think there is a lot of reasons why people may need more than 25 pages to argue in case. In part, because the brief, on the merits, is actually not 25 pages by the time you finish. As we all know, the pagination starts with the identification of the issues, and so you can have easily two pages of that when you're double spacing, and then you have a statement of facts, and then the summary of the argument.

And I don't mean to be forgetting something, especially in light of Ron's comment about how we create sometimes our own style.

(Laughter.)

MS. COOK: But by the time you start the merits of the argument, you are easily at Page 7 or 8,

and so it's not 25 pages on the merit.

But the things that I think contribute to needing to file lengthier briefs include the fact that, of course, as appellants, we must raise every single issue in the initial brief. And that includes, from my experience and my reading of the Court cases, not just the issues that I want to raise, but the issues that I think the GC may raise in reply, that I will need -- in response rather, that I will then want to reply to. And for example, if the Board issues a decision in which they have denied a claim on the merits and I make a pitch that they're -- that they failed to comply with the duty to assist, the GC may come back and say, "But it wasn't well-grounded." And so I need to, in my initial brief say, "By the way, I think the claim is well-grounded." The GC may come back on any issue and say -- and raise jurisdiction of the Court, which is of course, can always be raised. But again, I don't want to be in a position of positing that argument for the first time in my reply brief, for fear that the Court will then say, "You can't do this. You didn't raise it in your initial brief and so that is removed from consideration." So there are those issues. So there is jurisdictional issues, there is trying to foresee what the GC is going to do.

There is also, as we have heard over the last few days and as certainly all of us have been aware even in the absence of this conference, been a lot of changes in the law. And so as more and more cases are appealed to the Federal Circuit, it does become I think incumbent on appellant's counsels to raise issues that might be appealed, even if it's not going to be appealed in my case. If the case is -- if the issue is on appeal, or I am aware that it's going to be on appeal to the Federal Circuit, it's in -- certainly in my client's interest for me to identify that as an issue in the brief.

And so those things all add to the length of the brief, and I think justify expanding the page limit, or converting the rule to a -- to a word count. And I know that Joan and I had talked about this before, and I am not on the Rules Committee, and she told me that they had explored that and that one of the problems was, that the different word processing programs count words differently. I know that the Federal Circuit has figured a way around that. And again, I think that that gets into the substantial compliance concept, that -- that if someone certifies that the word count is what it is, whether their process counts the word "and," or doesn't count the word "and," that ultimately the -- the briefs are going to be in substantial compliance with the word count. So I think that that would be one way of dealing with this problem of briefs not being in compliance with the rules, in terms of the page limits.

In terms of extensions, I agree with what Ron said, that not all extensions are the same. Certainly, if I need to counter-designate a record and I don't have the claims file, I need as many extensions as it's going to take in order to get the claims file. I would point out as an aside, that that is again, an area where the Court has certainly been quite capable of enforcing its rules. Because once, without my filing motions, I have had orders from the Court directed to the GC's office, directing them to produce that claims file, if I have filed for more than a couple of extensions on that.

But I think that the number of extensions is clearly excessive. And I agree with Ron's point that, it has become a practice that the extensions are really controlled by Counsel, whether they're objected to or not. That by filing on the day, you get the extension by definition. And so I would suggest that the Rules Committee might consider, or the Court might consider, again going to the Federal Circuit Rule in objected to motions. If there is no objection to the extension, then filing on

the day does no harm to anyone. But if they're not agreed to, if one party or the other objects, then perhaps there should be a rule that the motion be filed ahead of time, which would require all practitioners, GC and the private bar, to think ahead about what's going on. But again, it's a matter of trying to get the cases moving as quickly as possible.

I think that the idea of having a number of limits to the number of motions becomes difficult, because like I said and as Ron said, that the -- the bases for the extensions is different and they are not all equal.

(Laughter.)

MS. MONTROSE: Thank you, Ron. One comment in connection with the motions for extensions, and I'm speaking now as someone who works at the Court and sees the motions after they have been filed. Again and again we see the statement in a motion for an extension, that there was an attempt to contact the opposing party, but it was unsuccessful. I'm wondering if the three of you, as practitioners, would perhaps make some comments about how tough or how easy it is to reach people, and whether you think your proposal about having to get motions for extension submitted far enough in advance would eliminate that problem, and that there should then be time to contact the opposing party?

MR. SMITH: I do not have much difficulty contacting the Office of General Counsel. I'm sure they have equal trouble getting in touch with me. I mean, it occurs from time to time, that I'll come in in the morning and there is a voice mail there from late in the previous day, seeking consent to a motion for extension. But on the whole, I'm able to reach them; they're able to reach me. If that's a sufficient response, I think I need to offer a rebuttal to my Joan.

Joan correctly points to a number of cases in which the Court has, one or two I believe it was, published opinions and in a number of memorandum decisions, enforced its rules. And I believe I said in my opening remarks, that the Court certainly has enforced its rules, in some cases. However, the purpose of a rule is not to have more enforcement. The purpose of a rule is to get more compliance, so that less enforcement is needed.

Now, I do not have time, and I suspect the majority of people in this room do not have time, to seek out and read all of the memorandum decisions. And certainly some of the decisions -- the memorandum decisions that Joan referred to, in which the Court has enforced its rules, were unknown to me. Therefore, if I was in similar violation, I would have no effective notice of the Court's intent to enforce its rules by virtue of the memorandum decisions.

The other problem with doing it by this type of enforcement procedure, is that it draws a line somewhere beyond the rule. In other words, you don't have to comply with the rule, you have to not exceed some level of violation of the rule that's undefined. And if you go beyond that invisible line, then you or your name shows up in a memorandum, or God forbid, a published opinion. So in terms of notice of what the Court is going to do and when it's going to do it, I want a clear rule.

With respect to Joan's point about staffing and the turnover at Group VII, I'm aware of that. That doesn't let the General Counsel off the hook one iota. The turnover in Group VII has been greater

or lessor for ten years, but it's always been there. The present FTE is insufficient. How do we know that? They're constantly, or pretty much, hiring up to their limit. That limit is not enough. They have 51, or I think they have 48 lawyers on staff right now, a FTE of lawyers of about 51.

Well, they're always going to be down one or two, because this turnover is going on. They're pretty close to their limit right now. I don't have a brief filed on time from Group VII period. Now, Joan says, they're keeping track of it. Well, with me you're at 100 percent. It doesn't get any worse than that.

Barbara suggests it's not a good idea to have the clerk's office sending these motions, briefs, and other papers back. She doesn't want the clerk or the Court checking on us more. They're checking. They're obviously checking. These things come to the Court's attention through the clerk's office or through the judge's chambers. They recognize the violations.

I believe that perhaps the clerk's office has a list of individual practitioners and knows who's filing how many extensions, who are the people that do it all the time. They are monitoring us and what I'm suggesting is, that we ought to have notice and the opportunity to avoid being on one of those lists.

MS. MORIARTY: Thanks. Just to address Ron's point, I'm sorry that you're the one practitioner we never get the briefs in on time. However, I can assure you --

MR. SMITH: Would you like to take a poll?

MS. MORIARTY: -- I can assure you, there are numerous briefs that are filed exactly on time. And I can see there are several irate attorneys out there in my group, who work very hard to make sure their briefs get in on time.

As far as contacting the other side and whether or not we can adequately reach them, the only difficulty we often have is if it's someone on the West coast, and we just have phone messages that go back and forth. That is frequently a problem.

One other thing to take into account, unlike private practitioners, we have a supervisory chain where attorneys draft a brief, submit it to the supervisor for review, and the supervisor is supposed to get it back to them in enough time to make changes. But occasionally there are those cases where when the supervisor reviews it we realize we've got a problem in the case and need to get an extension. At that time, yes, we are getting up close to the briefing deadline and we do need to seek an extension. Those types of situations, unless we restructure our office greatly, it's going to happen that we're going to be filing our extensions close to the briefing deadline. In an ideal world, if we didn't have a supervisor review, if the attorney could just file the draft, we would get a product in, but it may not be a good product. And so this way, we have the chain of supervisor review. If there is a problem, hopefully we catch it and seek an extension, although that may be close to the filing deadline. So that is one type of instance where we are going to be close --

(Interruption.)

MS. COOK: Well, in terms of leaving messages and getting contact back from the GC, I would say that it is occasionally a problem, and I think it's probably just people's schedules. But I think I'm probably one of those people who often files motions that say, "I haven't been able to reach the GC." And I leave messages -- and I guess I get the message back. By lack of a message, the interpretation I put on it is that this is very low on the GC's list, and so it's the last thing that's going to get taken care of.

I would say that I do file motions, probably 50 percent of the motions that I file are, "I have contacted, but have not heard back," and I don't have an explanation for that. I just know that it happens. And I do think that if I had a more advanced deadline, that it would less likely to happen, but that may be -- that's speculation on my part.

MS. MONTROSE: Barbara, the paper you submitted in consultation with Joan, dealt with summary affirmance. Is there less of a problem when a motion for summary affirmance is involved, as far as timeliness? Do those seem to come in a little quicker and easier, or not, from your point of view?

MS. COOK: The problem that I see with summary affirmance motions is that they are, in my judgment, overused as responsive briefs. I think that they present a separate problem when they are filed initially, before the record on appeal is filed, because it just becomes difficult in terms of the mechanics of getting the documents that need to be before the Court.

But the problem that I really see with them, is that I file a brief, and instead of filing a responsive brief, the GC files a motion for summary affirmance, so the motion for summary affirmance does not deal with the extensions. Frequently, you get a motion for extension, motion for extension, motion for extension from the GC's office, because he needs to write the brief, because the unusual complexity of the case. And then you get his response brief, which is a motion for summary affirmance, which is appropriate because of the relative simplicity of the case.

(Laughter.)

MS. COOK: And so I find those troubling. I raised that in the past. I think it links to one of the overall subjects that Ron was raising, briefs not being in compliance with the rules, because clearly a motion for summary affirmance is not a responsive brief. It does not have a table of contents. It does -- and more significantly, from my standpoint, it is a method by which the GC is -- and has been able to raise issues that are not raised in the initial brief, because it's his motion, and so he's raising whatever he wants, which I think is problematic.

And it allows the GC, quite frankly, to skirt the page limit rules, because again, he's not putting in the statement of issues and -- and the other things, and so he files a 25-page motion for summary affirmance, that were it a brief, it would exceed the page limits. So that's the concern I have about summary affirmances.

MS. MONTROSE: Joan, any comments on that?

MS. MORIARTY: First of all, we are permitted to file summary affirmances as the Court set out

in the case of *Frankel*. There are criteria that we are supposed to follow, in order to determine whether or not the case is appropriate for summary affirmance. The Court has also recognized that it's a practice that, while it's not prescribed in the rules, the Court as a custom has accepted our motions for summary affirmance. They have also in -- where the Court has found that the summary affirmance motions are not appropriate, they have rejected them and sent them back, and we filed briefs.

So to the extent that there is an overuse or abuse of summary affirmance motions, I believe the Court handles them. And I think in the majority of the situations, the Court finds the motion to be appropriate.

Again, we rely on the Court to let us know if it's inappropriate, and I think in the vast majority of the situations, the motion is indeed appropriate.

MS. MONTROSE: So you're saying it's a judgment call by counsel, after there has been an opportunity to look at the case, and if the call has been wrong from the Court's point of view, then you do file the brief?

MS. MORIARTY: Right. Well again, this is another instance where we may have a staff attorney draft the summary affirmance, the reviewing attorney look at it and say, "No, this is more appropriate for a brief," and -- you know, the office then submits a brief. So there are a number of checks in the system.

MS. MONTROSE: Ron, do you have comments on that?

MR. SMITH: Oh, I might have something, yes.

(Laughter.)

MR. SMITH: First of all, with respect to Joan's point about having the requirement to have briefs and other papers reviewed, certainly the government is not alone in that. Nothing gets filed from our office until it's been reviewed, sometimes twice, sometimes more than twice. So I don't think that justifies the last minute or the repeated motions for extension by the government.

With respect to motions for summary affirmance, I've had the same experience with the government. But on relatively few occasions there will be extension, extension, extension, summary affirmance. And frankly, I interpret that as, they don't have a very good response and our results from the Court have reflected that. So I think the motion for summary affirmance does dodge the requirement to file a brief and the formalities of the brief. And to the extent the Court doesn't get the benefit of having a table of contents and other things, if the Court's dissatisfied, I'm sure they'll continue to reject those motions.

MS. MONTROSE: Well, I think everyone's had a full say on extensions and forms of briefs and proposed sanctions, with some suggestions that may be practicable, as well as grist for the mill of the committee on the rules.

One question we did receive from a member of the Bar, deals with another set of rules that are also in your binder, the rules on admission and practice. It was a very interesting question and I wasn't quite sure what was behind it. But the question was, does the Court have standards of proficiency for practitioners? And of course, if you look in the rules on admission and practice, which adopt the ABA Rules, they're the very basic standard, that an attorney should know what he or she is talking about, before saying anything on the subject.

But I wasn't sure whether the question dealt with attorneys advertising themselves or holding themselves out as veterans law experts, as opposed to just the issue of filing a pleading before the Court, where it's pretty much up to the practitioner to satisfy himself or herself that that individual knows what he or she is talking about. But again, this is something that, since the panelists have been very active and long time practitioners before the Court, I'd be interested in hearing their comments and I think everyone here would be, on standards of proficiency.

MR. SMITH: Thank you. Well, my comments really are quite brief.

First of all, as we know, the Court early on determined that the practice of veterans law is not a specialty. And of course, that arose within the context of applications for EAJA awards, and I don't challenge that, and I don't know of any practitioner who has necessarily challenged that. So your requirements as an attorney are quite clear, and I think are controlled by the ABA Model Rules of Professional Responsibility.

With respect to non-attorney practitioners, which of course my organization is somewhat involved with, because -- and I say "somewhat" because while we're deeply involved at the agency level, the number of DAV non-attorney representatives admitted to practice before the Court is extraordinarily small, and I believe over the years has numbered five or fewer. And those requirements are clearly set out in the Court's rules and have been considered by the Rules Committee, and I think there is no suggestion that the present rule is inadequate in that regard.

So to the extent any of you might have questions about some non-attorney in your office who you might want to seek admission to practice -- seek to have admitted to practice, refer to Rule, I believe it's 46, and they're quite straightforward.

MS. MONTROSE: Joan and Barbara, do you have any comments on that? I think with the VAGC, as you have mentioned, there is the extensive system of review and supervision, so I don't know whether the question came from someone who is a representative of the Secretary or from the appellants' Bar. But it's difficult to see how that could be a challenge to the GC attorneys since they are supervised so closely, even the brand new ones, and of course are very knowledgeable in their own right after they have been there awhile. Barbara, any comments from you on that?

MS. COOK: No.

MS. MONTROSE: We had another question from the Bar at large. One of the questions that was dropped over the fence, came in via -- the ones that came in via fax, I could do a little detective work and see the area code where it came, or if they came in in envelopes, look at the postmark to speculate a little about the source of the question. But in most cases, the envelopes were opened by

the folks who were administering the conference, so I'd get the bare question. But in a way, that makes it more interesting, just like the surprise package left on the doorstep.

But another question dealt with the designation of the record, the counter-designation of the record, and the record on appeal; the rules and the process relating to preparing that most essential step in an appeal. And the particular attorney who submitted the question asked whether the Rules of Spoliation apply to the Court, which got me to pull the Black's Law Dictionary off the shelf and look up the Rules of Spoliation, which according to Black's are an equitable remedy, and deal with the situation in which one party can prove that the other side altered documents, to the disadvantage of one of the parties. And when this remedy is applied, the matter in question is considered conceded by the party who is guilty of the document altering or document loss.

Now, Ron, any comments from you?

(Laughter.)

MR. SMITH: Well, before responding directly to the question, I'd like to acknowledge how grateful I am for all of the work that Group VII does in putting together the Record on Appeal. It's a tremendous amount of work. I think in most courts that burden falls on the appellant, and I just want to thank the attorneys and the management of VA for all that you do, in relieving us of that tremendous obligation.

As far as the Rules of Spoliation, I think that if there ever was a case where a party believed that evidence had been altered or destroyed or removed from a file, and they could prove that, then this Court would take an extraordinarily dim view of that. I think there would be dire consequences for the Secretary and for his representatives. But other than that, I can't imagine how that would come up. There was, of course, the one very well publicized and unfortunate incident at the Board, but that is such an aberration, that I doubt that we'll see very many of those, if any.

MS. MONTROSE: Barbara, you grabbed the mike. You have --

MS. COOK: Well, only because I have a client who told me that there is a brouhaha in North Carolina over the same issue, but at the regional office level. So hopefully, that will be the second and final chapter in the destruction of documents.

I do agree that if that occurred, that someone could -- I would assume that someone could simply file a motion to have the Court acknowledge that, that it would be part of the proceedings before the Court, just as though a record on appeal is before the Court.

MS. MORIARTY: I think we're all in agreement that that would be an extremely serious matter and something that the General Counsel, as well as the Secretary would take strong notice of and, as you know, there is criminal proceedings that would probably accompany that. But if there was ever any question along those lines, I would encourage anyone to call the General Counsel and talk about it. We would certainly take that matter extremely seriously.

MS. MONTROSE: What about the process in general, for designation, counter-designation and

record on appeals? Do you believe that the system is working as it's set up now, or are there any recommendations that you would like to make to the Rules Committee?

MR. SMITH: Well, from my personal point of view as appellant's counsel, I think the system works very well now. I have one small concern, which I have raised with the Rules Committee, but nothing has been resolved as yet.

And as we all know, when you receive the designation of the record from the Secretary, it is not numbered. Now, this can be no problem at all. I have several pending cases right now, where the designated record is comprised of 1 or 200 pages. But when you receive a 4 or 5, 6, 700-page record and it's not numbered, you have a table of contents that may have 100, 150 items on it, it can be a nightmare trying to find what you're looking for in there.

We have discussed this with General Counsel Group VII and they have indicated that it presently would be extraordinarily difficult to number the designated record. I don't understand why, probably some technical reason having to do with the computer, which I hate, that this can't be done. But if it could be done, it would be a dramatic improvement in my ability, not only to represent my client, but to respond and to counter-designate the record and cut down substantially, not only on the time I expend, but the EAJA claim the VA ultimately receives.

MS. MORIARTY: Well, I can address your concern about the page limit, the page numbering on a DOR. It has nothing to do with the computer actually. It's -- as you know, the way the record is put together, we xerox the pages out of the veteran's claims file. What you get are the copies.

In order to put page numbers on them, it would require us to run every single DOR through our Docutech machine. We have one Docutech. We have countless DORs that go out every day. If we were to try to run every single one of them through our Docutech to put a page number on it, it wouldn't get filed and you'd be back complaining about more extensions, Ron.

So as a practical matter, what we do is wait until the TOR, until until we've got an agreement as to what is going to be in the record, then we use the resources of our Docutech to paginate the record.

MR. SMITH: Well, I understand that and I acknowledge it. However, I point out, and I speak only for myself and maybe for one or two in my office, but the number of cases in which we counter-designate anything for the record, are almost nonexistent. I can count on one hand, per year, the number of cases where we don't just accept the record as designated by the Secretary.

Now, I realize that there are many, many cases out there where you get these additional designations. However, I would point out, it's got to go through the Docutech once -- at least once under any circumstances. And if we could simply, in those cases where there is a counter-designation, append that material to the end so that you didn't have to run it through twice, you only had to add the material counter-designated to the end of the already designated material, it would be zero additional work.

MS. MORIARTY: Well, the one problem with that --

(Applause.)

(Laughter.)

MS. MORIARTY: But the topic of our conversation is rules enforcement. The rules require us to file a record in chronological order. If we were to take your suggestion, we would have records that were nowhere near in chronological order. And while you may not file very many counter-designations, we get several that are -- we get an -- numerous counter-designations that are 80, 90 items, and that would make, in effect, two records. We'd have the one that the Secretary did and the one that constituted the counter-designation. Nothing would be in chronological order and it would make the briefing process very difficult.

MR. SMITH: I look forward to your support before the Rules Committee to amend the rule, not to require chronological order for the counter- designation.

(Applause.)

(Laughter.)

MS. MONTROSE: Barbara, any comments from you on that, or are you happy?

MS. COOK: Oh, no.

(Laughter.)

MS. MONTROSE: You think it's all been said?

We did have a conference call, to discuss the questions that had come in and the general topics we were going to cover in this session, and three questions were raised during that conversation. And one of them I think originated with you, Ron. And it was a question on the choice to issue a dispositive order or a memorandum decision in a case.

And I was wondering if you had any reasons why you thought one was preferable to the other? Of course, that is a decision that is made within chambers, and I can't answer why sometimes one format is chosen and why the other. But I thought the question was an interesting one and I'd like to hear more about your thinking in coming up with it.

MR. SMITH: Well, I mostly think this is not a question which is appropriate for this panel, because we're talking about rules enforcement. I raised the question in general for the conference, hoping that it would come up in an appropriate panel.

The basis of the question is mostly one of curiosity. I cannot distinguish between the dispositive order and the memorandum decision. Now, obviously there must be some factor in the Court's mind when it makes this decision, and it's a matter of some curiosity. If there is a difference there, it would be of interest to the Bar and to me personally, to know what the considerations are that cause the Court to issue one as a memorandum decision, and the next one as a dispositive order. That I

think, is all.

MS. MONTROSE: You're talking about possible IOP clarification or some such thing. And the IOPs are in your binder and they're also available from the website as they're updated. A few people have said they didn't know such things existed, but they are out there and available for you to peruse and that may answer some of the questions that you have.

Another question, Barbara, I believe you said someone had asked you to raise, and again, it's not directly on enforcement of the rules, but it was on service on the General Counsel by fax, the various pros and cons. And Joan had a couple of comments on that too, which might be helpful and enlightening for the folks who are here today.

MS. COOK: Well -- well, the question that was raised to me was simply, why isn't service permitted by fax, particularly because there are certainly many instances in which we do fax the materials to the GC, in addition to sending it by first class mail, as a way of getting that to them? So it was simply a question that was presented.

MS. MORIARTY: I guess our office would have no problem with service by fax for short page limits, like motions would be fine. Any extensive, long pleadings like briefs, things like that, would be more appropriate being served by mail.

But we could set up a dedicated fax number for short pleadings, motions, any counter-designation statements, things like that, that we're limited in page number. And it would just be a matter of making sure that the items were faxed to one certain number that was checked regularly. We have a mail system in our office where anything that comes into the office needs to be recorded into our system and stamped in. So as long as it was sent to a dedicated number, we could probably work something out there.

MS. COOK: I don't think the page numbers would be an issue, because we can't fax briefs to the Court, or anything in excess of ten pages as it is. And so I'm assuming that if someone's mailing it to the Court, even if it's by overnight, that they would be mailing it then. I think the concept is more for motions, which are accepted at the Court, or notices of appeal, things like that, that are accepted at the Court by fax.

MS. MORIARTY: Yes, that probably wouldn't be a problem.

MS. MONTROSE: And our final topic after which, if we have some time left, we would entertain questions from the folks assembled here. We'd be happy to share these microphones now that we have two, and now that I have learned how to get it off the stand.

The final topic is the following: Are the issues raised by the Eighth Circuit case in *Anastosoff*, which held that the rules of that circuit concerning non-citation of certain decisions are unconstitutional? And the opinion focused on the importance of precedent in our common law forbearers in England and in the U.S. court system since its inception. And panel members, what are your thoughts on that case? Of course, the Eighth Circuit decision is not binding on this Court or on the Federal Circuit. But what do you think of the reasoning in that case, and what would be

the advantages, or possibly disadvantages in following that decision?

MR. SMITH: Well, I've only read the case twice, and the reasoning in the case is very interesting. The important thing I think that that court did, was make clear that just because an unpublished opinion could be cited, it does not mean that all opinions will be published, that we're not going to have a 12-fold increase in Fed Third as a result of that.

Now, always at the risk of stating the obvious, there is going to be a tremendous amount of litigation in all of the circuits and possibly even in this Court, over that decision. I have, as I suspect many in this room on both sides have, seen a number of memorandum decisions, the principles of which I would like to be able to cite in future cases, and of course, we can't do that. So there are advantages and disadvantages to both sides. How this is going to shake out is unclear to me, but I suspect that the Eighth Circuit's reasoning is not widely supported by the other courts.

MS. MONTROSE: Joan and Barbara, comments?

MS. MORIARTY: Well, I actually have to agree with Ron. I don't see that this is going to --

(Laughter.)

MS. MORIARTY: -- I don't know that this is going to impact our Court immediately, particularly in light of the fact the Court just reissued its rule concerning the fact that we should not cite non-precedential decisions. So at this time, I don't see it as impacting us.

MS. COOK: I -- I suspect that's correct and I -- but I do know that there is frustration in the private bar, and I suspect among at least some people in the GC's office, about the point that Ron just made, that there are certainly times when you have a -- a single judge's decision that appears to be directly on point. And it would be nice to be able to sort of point that out to the Court and attach a copy of it. And I understand that there is potential for abuse on that, and -- and that they are non-precedential. And I -- I can appreciate that -- that no judge wants -- wants a brief that is filled with citations only to non- precedential opinions. That would not be a very helpful -- helpful brief, but there would be an advantage. But I -- I don't anticipate that rule being changed.

MS. MONTROSE: Well, thank you very much, panel. Those are our topics and our prepared questions. We would have time for a question or two from the members of the audience.

MR. COMEAU: I wanted to make a couple of comments.

MS. MONTROSE: The Clerk of the Court has asked to make a couple of comments, so we'll call upon him first.

MR. COMEAU: First of all, with respect to the enforcement of some of the Procedural Rules. I wanted to mention that indeed, the rule requiring proper service and the rule requiring contact with the other side, are being enforced as often as my docket clerks catch them. Whenever they catch those errors (and in the scramble to get up-to-date with the new case management system, some of those are getting by) but as they catch them and bring them to my attention, we are returning those

pleadings and giving ten days for a corrected filing to come back. Also, as we catch motions that are filed with no basis at all, those are similarly being returned for a corrected filing.

There was a comment made about orders for VA to produce the C-file. We don't do that. We did that a few years ago. We don't do that anymore. However, we are on the lookout for repeated motions for extension to file a CDR because the appellant's counsel has not received the C-file. And after several of those motions, we are ordering the Secretary to report in 15 days, and then every 15 days thereafter, what actions are being taken by the Department and not just Group VII to produce the C-file.

Now, in order to make that system work better, appellants' counsel, what you need to do when you file your motion for extension, is tell us when and how you requested the C-file. Because if you're just sitting back there filing motions for extension, nothing is going to happen, unless you have requested the C-file through VA General Counsel. So you need to let us know that you have done it, and when you have done it, and then when that time drags, we will issue that order to VA. But we're not trying to beat VA over the head and shoulders, when you haven't done your part of the task.

MS. MONTROSE: Judge Greene, do we have time for a question from the audience or --

JUDGE GREENE: Sure.

MS. MONTROSE: Okay. If you would come up please and give your name, because we are recording the proceedings.

MR. JARVI: Ted Jarvi from Tempe, Arizona. My question is similar to Ron Smith's, relating to designation of the record. The current rule requires that service medical records only be designated one year at a time. Sometimes that results in a single designation of hundreds of documents. When designating the record, individual VA medical records are -- are picked out and identified. It creates a great deal of difficulty, particularly when service connection is the issue, to have to go all the way through one year's medical records, when the person may have spent the entire year in the hospital. And I would hope that the rules could be revised, so that individual service medical records could be identified and much -- more easily accessed.

MS. MONTROSE: Joan, since the VAGC does deal with the designation initially, do you have a comment in response to that?

MS. MORIARTY: Well, I'm not quite sure what the response would be to resolve the concern. The rules do require us to put the service medical records in by year, in chronological order. To then -- I guess, you would like them by month in addition?

I think at at some point it gets unwieldy, as far as trying to get the work product out on time. If we get them in by year, I think the cases in which you have hundreds of pages of records for one service year, is a -- a low percentage of the time. And to craft a rule to address a situation that's just not going to happen that often, would not be a good use of the Court's rules at this time.

MS. MONTROSE: Any comments from the other panelists on that?

Well, I believe that's all we have time for.

So, Judge Greene, I will turn the microphone back to you.

JUDGE GREENE: Very, very well done.

(Applause.)

JUDGE GREENE: You see, Sandy does all of this work at the Court, and then she serves as Co-Chair of the Planning Committee for the Conference, and then she also says, "Well, I'll moderate the panel." So let's give her another hand for that.

(Applause.)

JUDGE GREENE: And to Ron and Joan and Barbara, thank you, very much for your insight. I think the judges have taken this in due course, and we'll discuss it at our next Board of Judges meeting. On behalf of my colleagues on the Court, I want to present to you our paperweights, as an expression of our appreciation for a job well done. Thank you.

(Applause.)

JUDGE GREENE: You've got time for a break, a ten-minute break. Just a minute.

(Laughter.)

JUDGE GREENE: Now, this is going to give Professor Myers time to set up for his presentation. There is coffee outside, but I would ask you to return at five after ten, by my watch.

(Laughter.)

JUDGE GREENE: I now have six of, so you've got 11 minutes.

(Break.)

JUDGE GREENE: Regarding evaluations forms for the conference, remember, there was a form for each day, and as we get into the mix of the ethics presentation and then the closing, I don't want you to forget to drop off the form for this day. Be sure to do that, in order to ensure that you get your credit.

It was brought to my attention also, that during yesterday's presentation of awards, some people got the impression that the Hart T. Mankin Award had been renamed the Frank Q. Nebeker Award. That is not so. If you recall, the Distinguished Service Award is for individuals or groups outside

of the Court, who have presented outstanding distinguished service to veterans jurisprudence.

The Court's Outstanding Achievement Award was for individuals within the Court, who have provided outstanding service to the Court. That's the award that was named in honor of our dear Chief Judge Nebeker. So I hope that settles the confusion there.

And finally, yesterday the Clerk gave his presentation to the session, and announced quickly that he was retiring. And of course, we all hate to see him go, but I don't want to miss the chance among this assembled crowd, to once again acknowledge all of the outstanding work that he has done at this Court since its inception, either as the Chief's Executive Attorney or as the Clerk. So let's give Bob Comeau another round of applause for a job well done.

(Applause.)

JUDGE GREENE: It is my pleasure now, to pass the podium over to my colleague, Judge Jack Farley.

JUDGE FARLEY: I can't tell you how honored I feel to know that as Bob Comeau is leaving, he has chosen to walk like me.

(Laughter.)

JUDGE FARLEY: I'll answer Ron Smith's burning question, just so he doesn't continue on in agony for years --

(Laughter.)

JUDGE FARLEY: -- as to why there are orders and why there are memorandum decisions. The answer is, Ron, there has to be a little mystery in life.

(Laughter.)

JUDGE FARLEY: I will speak only for myself, and you probably will find more exceptions than the general rule, but if we are resolving a motion, it's an order. If we're deciding a case, it's a memorandum decision. Now, go and find thousands of exceptions to that, because they are there. And that is only in my chambers. Everybody else does it differently. So does that solve your problem?

MR. SMITH: No.

JUDGE FARLEY: No? Good.

(Laughter.)

JUDGE FARLEY: I have a son named Brendon. Five years ago, he called from Villanova during his sophomore year to announce what his major was going to be. I was excited and looking forward

to this announcement. In these days of dot com, days of engineering, of great, great opportunities out in the world, he announced proudly to his mother and me, that he was going to major in philosophy.

(Laughter.)

JUDGE FARLEY: I rushed out. I got the Washington Post and I looked in the employment section.

(Laughter.)

JUDGE FARLEY: There was not one job for a philosopher. And then I said to his mother -- I didn't tell him this. And I said to his mother, "You know, I don't even know a philosopher." And then I realized that I did.

About 20 years ago, I met a man who was a philosopher. I have been privileged to be in his classroom. I have worked with him, taught with him and watched him work. He is a philosopher and a lawyer; a Ph.D. and a JD. He is a man of judgment, a Vietnam veteran.

I was in the Denver airport in 1994, and it was just after that new airport opened, . And you know those people movers, where they go by each other, and I'm at one end going this direction. And all of a sudden I see coming toward me, a bald head, and I recognized it as the Judge Advocate General of the Air Force, Nolan Sklute. And we recognized each other simultaneously, at about 40 feet apart, 38, 36, 35, 40, getting closer and closer. "Nolan, how are you? Good. What are you doing?"

And Nolan said as we got closer, "We just lost Charlie." I said, "What do you mean?" "We just lost Charlie Myers", and he's now 25, 30 feet past me. I said, "What do you mean, you lost him?" He said, "He's leaving JAG. He's going" and louder now, "to become Chairman of the Philosophy Department at the Air Force Academy." And by then Nolan and I were gone. It was a great loss to the JAG Department, although Charlie never really left it.

He's going to talk to us today about moral philosophy and legal ethics. His resume is before you. I, however, feel compelled to point out one flaw, one character flaw, one flaw in his background. I cannot conceive of this. In his junior year at Tulane, he studied abroad at the University of Saint Andrews in Scotland, and he did not play golf once.

To make us think of the ethical challenges before us, I present Charles R. Myers, Ph.D, JD, Professor Emeritus and former Chair of the Department of Philosophy at the United States Air Force Academy. Charlie Myers.

(Applause.)

COLONEL MYERS: Thank you, Judge Farley. I really appreciate those remarks. I very much appreciate being asked to speak to you today. I've been looking forward to this for some time.

I'm going to take a certain risk now and tell a joke. It's a risk, because I haven't heard any jokes

so far, and --

(Laughter.)

COLONEL MYERS: -- and so maybe -- maybe I'm making a mistake just doing that. It's a risk further because there is probably no one worse at joke telling than I am, but I'm still going to make the attempt.

This, by the way, is a joke I heard when I was fortunate enough to make a trip to Byelorussia, talking to military officers there, including JAGs, Byelorussian JAGs, about our system of justice. And our translator, a man named Alex, told this joke. And I thought, well, if this guy, not a native speaker of English can do it, I'll go ahead and give it a shot, too. I thought with Alex, I had met one person who was worse at telling jokes than I am, and if he could get away with this one, maybe I could too.

In any event, it's a joke about a parrot. A pet-shop owner has placed this parrot in front of the shop, just out there as an attention getter. A man walks by the pet shop. As he passes the parrot, the parrot says to him, "Hey Buddy, you know what?" And the man turns to the parrot and asks, "What?" And the parrot answers, "You're ugly." The man is offended and he thinks that the pet store owner ought to know about this because he doesn't want the parrot to behave this way. So he goes in and tells the pet store owner, and the pet store owner says, "I'm really sorry. I thought we had that fixed. I'll take care of it."

He goes out, he gets the parrot and he takes the parrot in the back. There is a lot of banging and squawking, and he brings the parrot back out. There are feathers everywhere, and he says, "I don't think this will happen again." And he puts the parrot back out in front of the store.

As the man leaves the store, however, the parrot turns to him and says, "Hey Buddy, you know what?" And the man looks at him and says, "What?" And the parrot answers, "You know what."

(Laughter.)

COLONEL MYERS: So in some respects, I feel as if I'm in the position of the parrot. I'm telling you, not that you're ugly, but --

(Laughter.)

COLONEL MYERS: -- but telling you things that, to a large extent, you already know, talking about legal ethics.

But what I hope I can do this morning is to provide a somewhat different perspective on legal ethics. Instead of talking about the details of our very important Rules of Professional Responsibility, I'd like to bring a different perspective to those rules, and talk to you about the rules from the perspective of moral philosophy.

Now, I've been spoiled doing philosophy at the Air Force Academy, that is, talking about moral

philosophy to cadets, because they don't put up with much nonsense. If I said something stupid, they asked a question right away and straightened me out, and I hope you'll do the same thing this morning. Don't wait until the end to ask questions, but stop me anywhere you like along the way to ask for a clarification or to correct a mistake on my part.

Let me start by saying that there is no question that ethics is big business today. Sir, there may not be any jobs for philosophers in the want ads, but there are jobs for ethicists, or people holding themselves out as ethicists. Ethics is big business.

When I was in graduate school in philosophy, ethics was kind of a backwater of philosophy. A few people were doing it, but not many. Today, it is the mainstream in philosophy. Twenty or 30 years ago, there was nothing known as an ethics center. Maybe there was one or two, but today there are 300 or 400 operations called "ethics centers." Every university and every college, it seems, has an operation called an ethics center. Businesses have ethics advisors. Hospitals have ethics committees with ethicists on them.

Ethics is a big deal, a booming business. Booming so much, that I sometimes wonder if -- you know, by analogy to the stock market, we should be worried about an irrational exuberance about ethics, whether it's all going to come to an end some time soon.

One result of all of this talk about ethics is that there are lots of different things that go by the title of "ethics". There are the pitches to be good persons and to do the right thing, moral exhortations. That's very important and very useful. There is ethics as lawyers do it. That's professional ethics where we codify the actual practices and customs of particular groups for us lawyers. We make up a code, something like a traffic code for lawyers.

But there is another meaning of ethics, and that's what philosophers have been doing, moral philosophy, the attempt to theorize about how best to understand, how best to explain morality, and how best to lead a good life. Philosophers speculate about these things.

And what I'd like to do this morning is bring those last two senses of ethics,(ethics as a professional responsibility, codified rules, and ethics as moral philosophy) together and ask what they have to do with each other.

Now, why ask this question? Why take this approach? I think for me, one reason for asking this question, is that it may help us to understand what I've called in your outline, the difference between the reality and appearance of legal ethics.

As for the reality, I think, being as objective as I can about it, that lawyers and judges are leaders in professional ethics, that they are deeply committed to justice and equity. All of you are. And in the field of applied ethics, which as I have said is a big business now, spreading to business, medicine, journalism, military ethics -- in this area of applied ethics, lawyers and judges have been the leaders. There is no profession more committed to articulating and enforcing ethical standards. And lawyers, to a large extent, have been responsible for the ethics boom. That, I think, is the reality, but it's not the appearance.

And what I will say now is just my own experience. Maybe it's a skewed experience, maybe it's distorted, but I'd like to tell you what my experience has been in the last five years, my experience upon leaving JAG and going to the Air Force Academy to teach philosophy.

I mean, the first thing I heard again and again from people who were only half joking was, "This is crazy, a lawyer teaching ethics. This doesn't make any sense." The appearance of legal ethics is bad, and if I can judge from my experience, it's even worse than you think. You have some hint of it, but I suspect you may have to go through an experience like mine, where you appear to have left the practice of law, appear to have left law behind, and people look at you, as they looked me, as born again, as having given up on law.

In the outline later, I refer to a book that I think all of you would enjoy reading, by Anthony Kronman called *The Lost Lawyer*. If I can judge from my experience, if that book had been entitled *The Last Lawyer*, it would have been a best seller.

(Laughter.)

COLONEL MYERS: I can't tell you how many conversations I've had with distinguished, informed, educated people, who are convinced that the legal profession is destroying decent people and the nation. In these conversations, again, if I can judge from my experience, present company is always accepted.

I'm thinking of a retired general officer in the Air Force who told me, quite seriously -- this was at a dinner where Judge Noonan from the Ninth Circuit was the speaker -- how terrible things were because of lawyers. Now, of course, he wasn't talking about Judge Noonan, he wasn't talking about me, and by the way, he wasn't talking about his daughter who was a lawyer, but everything else about the profession was -- was very destructive.

Now, why should this be the appearance, that legal ethics is seen as a system for perpetuating the legal system -- a means of perpetuating the legal system, not for the good of the public, not even particularly for the good of clients, but for the good of lawyers? Why this disparity between the reality and appearance of legal ethics?

Well, what I'd like to suggest to you this morning is, that there may -- I'm sure there are dozens of explanations for this -- but the one I'd like to offer you this morning is that perhaps there is something missing in the way we do legal ethics, in our professional codes, something that's not there, that the public perceives is not there, maybe we perceive is not there. And that to identify these deficiencies, moral philosophy might be helpful -- that is, the way philosophers and others talk about the good life, what it is to lead a moral life. If we bring that to bear on legal ethics, we may be able to see what these deficiencies are.

Now, don't forget what I told you I think the reality of legal ethics is, that it's a wonderful, admirable achievement that the profession has made in our legal ethics program. But I do worry about this disparity between that reality and the appearance.

Also, don't misunderstand. I'm not proposing that moral philosophy replace the ABA Model Code

or any state's rules. That would never work. I'm not saying that we should stop doing professional ethics and start doing moral philosophy instead. I simply want to suggest that there are some gaps in the way we do legal ethics and that looking at moral philosophy may help us figure out what those gaps are.

So what I propose is to point out two of those gaps to you this morning. One is in topics, the subject matter of ethics that we don't consider, and in particular, talking about character. And then to point out a second gap, in what -- in understanding what the relationship between law and morality is and how we talk about that.

So let me turn to the first topic. I think one of the achievements of moral philosophy is to identify the principles, the organizing principles or the axioms that explain morality. And if we look at the history of philosophy -- of moral philosophy over 2500 years as an attempt to do this, you'll find that moral philosophers have fallen and have taken three broad approaches to talking about ethics.

And the way I explain this fact to myself, is to say that ethics is about someone doing something to someone. That's the subject matter of ethics. That's the subject matter of law, for that matter. And we see there are the three -- there are three components of any ethical situation: The someone, doing something, to someone. And philosophers looking at the ethical situations have focused on one or another of these three dimensions of morality. Let's -- I'll go through them quickly in reverse order.

Let's look at the -- the third element, the outcome. There is, the someone, the agent who acts, the act he or she performs, and then the outcome of that act. The style of moral philosophy that focuses on the outcome is called "consequentialism" or "utilitarianism." On this theory -- on this approach, morality is about producing morally desirable results. We can understand morality, we can explain it to ourselves, we can correct our moral intuitions, if we understand that morality has a purpose. Its purpose is to make the world a better place.

This is the utilitarian approach of John Stuart Mill and Jeremy Bentham, who, as you know, had a tremendous impact on the formation of law in the 19th Century, in the codification of law in particular.

On this approach to morality, what we ought to be doing is producing the greatest happiness for the greatest number. And we can understand all our moral intuitions, all of our moral rules that way.

There is a second approach to morality. It goes by the name of the philosopher's name, the "deontological" approach. It's the theory of duty. On this approach, morality is not so much about producing good consequences, but about doing the right thing. That is, that there are some acts which are wrong, some acts which are prohibited, some acts which are required, regardless of the consequences. On this view, morality is not about the consequences so much as about acts, just doing the right thing.

And I think the philosopher most connected with this approach is the German, Immanuel Kant. And Kant's achievement, I think, was to show why there are some acts that are prohibited and some acts that are required, regardless of the consequences. He did that in terms of respect for human

dignity. All duty, he claimed, could be reduced to that. We are required to do acts that we treat others as ends in themselves, to show respect for human dignity, regardless of the consequences. So on Kant's view, we are required to tell the truth, even when telling lies would make everybody much happier, because lying shows disrespect for human dignity.

These two approaches have dominated philosophy in the last couple of hundred years, but there is a third approach. In fact, it is the third approach with which Western philosophy and -- from a philosopher's perspective, Western civilization -- began, and that's the approach that Plato and Aristotle took, an approach that's been revived and much examined in the last few decades.

The approach that focuses not on the consequences, not on the act, but on the agent herself, on the person who performs these acts. That's the way the Greeks started talking about ethics, asking not so much what should we do, but instead, what kind of persons should we be? What character traits should we develop? What are these character traits and where do they come? How do we get them?

Okay. So that's a quick survey of the areas that moral philosophers worry about: Agent, act, and outcome. Now, I'd just like to ask you, how do our Professional Rules match up to these three approaches? I mean, if -- if we say that -- you know, the way moral philosophy has developed, there are three areas we have to account for: The agent, the act and the outcome. How good a job do our Professional Rules do of accounting for these three areas? What approach do our Professional Rules, in fact, take -- the agent-based approach, the act-based approach, or the outcome-based approach?

Anyone like to take a stab at it? Well, here's my proposal, the one I have in the outline. I think if you read the rules, you look at the way we do legal ethics, you'll say that it's an act-based and an outcome-based approach. The rules prescribe certain acts, require or prohibit certain acts, so it looks Kantian or deontological in that respect. But we usually justify those requirements in terms of -- in some utilitarian terms, by looking at the outcome.

The example I gave you in the outline is the Rule for Confidentiality. It's just a flat rule of maintaining confidences. But the basis for the rule is a utilitarian one, that this will improve the free flow of information necessary for the system to work.

You can see what I'm leading up to and that is, we've got rules based on act and outcome, but we don't say anything about character. I think the way we -- we do legal ethics, is just to forget about character, to forget about the kind of persons we should be.

As I mentioned earlier, character ethics is a big deal in philosophy now. It's a big deal in education now. Go back and look at the news magazines' reports on ethics and the growth of ethics. Look at what's going on in the schools that your children are going to. And I think you'll see that the talk there is about character. There is an elementary school I drive by frequently and the marquee every week has the trait of the week, whatever it is, cleanliness or courtesy. But clearly they're focused there on moral education at the elementary school level, and I think you'll see this continuing beyond that, is on character traits, what traits should we have.

Now -- and I mentioned in your outline that there is already a lot of talk going on about this --

Kronman's *The Lost Lawyer,* Glendon's book on *A Nation Under Lawyers,* both worry about this and give us reasons to think about character.

And now I can maybe offer a second excuse for that parrot joke because it was Aristotle who talked about parrots. Aristotle said a person who is merely doing the right thing or producing good consequences, but not acting out of character, acting from character, is like a parrot who happens to speak a grammatically correct sentence.

We don't admire the parrot for doing something grammatical. We know that the parrot is merely repeating, merely acting out of routine, not understanding what's going on. A morally good life, a morally good action for that matter, has to proceed from character. It has to proceed from a fixed and settled disposition to behave in a certain way. It's not enough to live a good life, to live a morally rich life, merely to do the right thing. One has to develop character.

This is missing from our rules. It may have been there at one time. Some of you may remember that before the 1983 ABA Code, the structure of the rules was somewhat different and there was something in the rules referred to as "ethical considerations." Do you remember that?

There were the Disciplinary Rules and then there were the Ethical Considerations. These were described as aspirational goals. These were not disciplinary rules. No one would be disciplined for failing to meet the ethical considerations, but they were goals towards which we should aspire.

Now, I came into legal practice too late to have any experience with the Ethical Considerations. They were changed not long after I started to practice. They went away not long after that, so I can't say from my personal experience whether they did have anything to do with character or not, or did have any effect on character. But it seems to me that they might have, and that this move away from ethical considerations is something we should worry about, or think about, or handle --- you know, deal with.

The Ethics 2000 Project of the ABA, has explicitly rejected a return to Ethical Considerations. It was proposed that they be brought back into the Rules, and that project updating the code has rejected that approach.

The ABA Code used to provide that lawyers should help a client reach a decision that is not only legally permissible, but is also morally just. That is no longer part of our professional ethics. That link into character, that notion of character as good judgment producing results that are morally defensible, as well as legally permissible, is not there, at least not in black and white, not in -- in that part of the code.

You know, on this approach, when we don't talk about character, we forget that being a lawyer should mean striving to become a distinctive, admirable, good kind of person. We just don't talk about that in -- when we do professional ethics.

And what I'm suggesting to you this morning is that it would be helpful to bring that back into our talk about professional ethics. Maybe not by putting it into the rules. That might be a mistake to put it in the rules. But we ought to at least bring it back into our discourse. It ought to be something that

we're worried about and we talk about.

What kinds of issues would we worry about if we started talking about character again? Well, I've listed a few for you in the outline. One is, we ought to ask whether our focus is on conduct, to the exclusion of character, whether our focus on conduct has resulted in over-regulation of conduct? Do we now have a system where we've over regulated everything, producing an environment where there are pitfalls for the unwary, because the regulations are complex and difficult to unravel sometimes; and also, producing an environment where a cleverness in manipulating the rules and following the rules is more important than living a virtuous life, so that our focus becomes cleverness and getting around the rules, rather than being a good person?

Here's another issue we might consider. What about conflicts between personal and professional integrity? This is a big deal in legal ethics, something we talk about a lot. But why do we frame the question that way, that there are conflicts between personal and professional ethics? I mean, why are our codes -- so many words in our codes focused on conflicts?

What integrity means -- you know, from a philosopher's point of view anyway, and I think from the moral education that we're trying to provide to our children, integrity means, integratedness, that we have brought our lives together, that we're not a mass of conflicts, but that our lives have been integrated. And yet we write our rules and we talk about our rules as if endemic to our profession is this conflict between what we would do in our personal lives -- between our personal integrity and our professional integrity. Does this -- do our rules, because they don't talk about character and focus only on conduct, assume a certain schizophrenia?

And another issue we might talk about is whether our focus on conduct to the exclusion of character puts us out of touch with human realities. One complaint you've heard, I hear regularly about lawyers, is that we live in an abstracted world, a world of abstractions, not a world of people, but a world of ideas and legal concepts. And we forget about the human realities.

By the way, that may not be the case for this Bench and Bar. I have heard so many references in the last couple of days to reminding ourselves that we're dealing with human beings, not just with appellants, not just with legal concepts, but with matters that affect human beings, individual human beings.

But I think if we do ethics as a matter of conduct, without talking about character, we're going to be inclined to live in a world of abstractions. We'll forget about our own character, forget about what we desire to be as persons ourselves, and start treating the people whose lives are affected by what we do, as abstractions too, not as people, not as persons with character.

And the last issue I would raise for you, one I failed to include in the outline, is that if we were going to talk about character, if we started bringing that back into legal ethics, we would have to ask ourselves what traits do we want lawyers to have, and how do lawyers get those traits?

That's the way the Greeks started all this talk about character. Socrates, in the dialogues, would get together with other people and they'd start talking about character traits. There's a wonderful dialogue relevant to the military called, The Laches, in which Socrates, an infantryman, gets together

with retired admirals and generals -- I guess the equivalent of retired, former admirals and generals in Athens, to talk about courage. They asked themselves, "What is courage?" And it turns out that none of them can really give a good definition of courage. But what gets them started on this discussion is concern about their kids. We have sons. We want them to be courageous. How do we go about making them courageous? That's -- that's the starting point for the dialogue.

And if we were talking about the traits that we want lawyers to have, we would have to face the same issue. How do we develop those traits in ourselves, and in other members of the profession? That would become a topic of legal ethics, in a way that I don't believe it is today.

So that's the first gap I wanted to point out in legal ethics. The gap that we are not talking about character or not talking about character enough. A gap that I think we can see by way of moral philosophy, which -- you know, shows that conduct is important, outcomes are important. But we can't have a complete picture of the ethical life, of the moral life, unless we also talk about character.

I could stop now and see if there are any questions before I go on to my second point. Any issues about character? Yes, sir?

AUDIENCE PARTICIPANT: I wanted to say to a room full of people who have been rated and had to rate other military leaders, that I have always personally thought that the most important thing that makes our military great, that makes our country great, and gives us --

AUDIENCE PARTICIPANT: Thanks. I have always thought as a military officer -- and I'm sure there are an awful lot of present or former military officers in this room and we have to rate each other. And I have always thought that the most important criteria that we are specifically required to address, is that issue of moral courage.

And I've -- I don't know how the rest of you feel about it, but I think that when President Truman said, "The buck stops here," that applied to every one of us. When you hit that really tough, tough situation, where just doing your job isn't enough, where you have to have the guts to put your career on the line or -- or make a decision, or do something that's right and take a risk for other people. And I guess what I see in what you're saying is that, as fiduciaries with other peoples' lives and -- and affairs in our -- in our trust, we've -- we've got, as lawyers, to do the same thing that we've had to do as officers.

Could I also say, that wherever that short memorandum to Paul Everest is, if you could put it up there on the table when you're through with it, Paul has had a small stroke and it's kind of a "Get Well" card, and anybody that would like to come up and sign it, if you would just put it up there by -- by Judge Farley, we could get people to sign it. Thank you.

COLONEL MYERS: Well, I think that's a good comment, and it provides a nice link to what I'd like to go on and discuss now. But your point is, that the good practice of law, a good lawyer ought to be a person with moral courage. And today, we leave that to chance, I think, as we do professional ethics.

As we get together and talk about being good lawyers or doing the right thing, we don't talk about

being good lawyers. We talk about doing the right thing, and we leave moral courage to -- to chance. We don't say -- know what it is exactly. We don't know how to develop it.

MR. MILLS: -- prior to the late 1960s, as part of the admission procedure to the Bar. We still have the same thing. And in those days, they really actually made an assessment of your character, before they would let you become a lawyer. And I think that fits in very nicely with what you're saying about character being important. Those days were different. In those days, a lawyer could be disbarred for taking a divorce case and not suggesting reconciliation.

COLONEL MYERS: That's a -- a helpful point, and if I could link to it. It may sound to you as if what I'm proposing is looking backwards, looking back at the way Aristotle did ethics, looking back at the way the ABA did ethics in the 1960's or before 1983. And that does worry me a little bit about this concern about character, that we -- I don't think it can be merely going back and trying to recover something that's been lost, or looking at it the way they used to do it.

If we're going to talk about character, we have to take those things into account and -- and do what we can to recover that. But I think we're going to have to be more innovative and creative in thinking what -- what we hope for out of character. And that's, as far as I know, not something we're talking about as a Bar. There are legal scholars doing it, but as a group we're -- we're not worried about those things.

Well, let me take your point about moral courage, to continue to the second thing I'd like to mention to you. Whether philosophers have fun talking about morality and asking where it comes from, whether they focus on the act, whether they focus on the outcome, or whether they focus on the agent, philosophers then go on and ask, what -- what are we talking about when we talk about morality? Is it an objective reality? Is there something really out there, or are we merely talking about our opinions and our emotions? Where does morality come from? What is -- what gives it its authority?

And philosophers can have a lot of fun doing this, solving a lot of intellectual puzzles about this. The way the Greeks framed their question was to ask whether morality is by nature or by convention? Is it just an agreement among us, or is there something in the world, in the universe, a normative dimension to reality?

Now, this is philosophy, it is what they do at Villanova, and I hope your son had a lot of fun doing it.

(Laughter.)

COLONEL MYERS: What is its relevance to us though as -- as lawyers? Well, I think it is relevant. I think that these philosophers' questions about the basis of morality are not just an intellectual puzzle, not just an intellectual game, but that they do point out significant practical problems about law. In particular, they -- they raise questions about the relationship between law and morality.

I mean, there are many different possibilities here, but there are at least three logical possibilities.

One is that, morality is derived from law, that law tells us what morality is. That was the position of Thomas Hobbes. Before you have law, he said, there is no morality. In a state of nature, there is no morality. When you make up the law, then, for the first time, you get morality.

You know, at the other extreme we have views that law is derived from morality. This is the view expressed by Martin Luther King in the letter from the Birmingham jail, that I'm sure they read at Villanova, and I hope that some of the rest of you have had a chance to read it as well. This is the view, that a law that doesn't conform to morality, a man-made law that doesn't conform to the law of morality, is not a law at all. It has no authority. It is not binding on us.

And between these two extremes -- that morality is derived from law, and law is derived from morality -- there are lots of positions in-between, that there is some way as to where the two link up.

What does it matter how you answer this question? Well, I think it does matter. Maybe not so much that you've answered the question, or how you answered it, but that you have thought about it. It matters as to the issue of what you do when there is a conflict between law and morality. And I think that's what you were getting at when you talked about moral courage. What do we do when the law permits, or requires us to do something that is immoral, when law and morality conflict? What do we do about that?

I mean, we could just define the possibility away and say, well there -- there is no conflict, because morality is derived from law, and whatever the law requires is moral. But -- but I don't think many of us would be comfortable with that approach.

That's the approach I've called in your outline, the Dred Scott approach. That it's not the province of the Court to decide upon the justice or injustice, the policy or impolicy of these laws about slavery and fugitive slaves. That that's not the job of the Court to talk about justice and injustice. In that view, if it's not the job of the Court to do that, it's certainly not the job of lawyers to do that. But I don't think that that's a satisfactory answer, not for a person striving to live a moral life.

Now, you might say, and it has been said recently by Judge Posner in an attack on moral philosophy, that this is a non-issue, that judges get into moral quandaries only when the law points to a result that violates their deeply held moral beliefs, and that doesn't happen in this country, or that's not a routine predicament in this country. That we just don't see conflicts between law and morality.

I hope this isn't too grim a suggestion, but I want to give it to you. That is, whether this claim that we don't face conflicts between law and our deeply held moral beliefs, that that's not a routine predicament for us -- that that claim is not so much a description of what life is like for us, fortunate as we are to live in a country as dedicated to morality as well as legality. That it's not just a description of the way things are for us, but it becomes a self-fulfilling prophecy as we say that there are no conflicts between law and morality, that that's not a routine predicament, I just don't see it in my practice, I don't see it in my life. Then that becomes our expectation.

We don't see the conflicts between law and morality because we don't expect to see them, and that's where moral courage would be required. Not just to act correctly once we see the conflict, but

to see it in the first place.

I think this is what worries the layperson about legal ethics. And you've heard it all before -- you know, "How can you defend somebody you know is guilty? How can you present a case, which you know is not quite the truth?" I mean, you're presenting the facts from your perspective.

This is what worries the layperson, the apparent conflict between law and morality, that law requires us to do things as lawyers, that we would never do in our personal lives, as individuals.

Reference to the adversary system will take care of these concerns and to a point, up to a point, that's a decent answer, but not all the way. We have to, I think consider the possibility that law and morality may conflict, and we have to consider what we would do if we saw that conflict.

But as far as I know, that's not what we're talking about, when we get together and talk about professional ethics. We don't consider that possibility. We don't talk to each other about how we would recognize a conflict between law and morality. Sometimes we talk about it just as a gut reaction, that it's shocking to the conscience. And so when it happened, we would -- we would just know it, because it's shocking to the conscience.

But couldn't we do better than that? Couldn't we spell out some objective, or more or less objective, standards for saying -- for saying when we would see a conflict between law and morality? I don't know if we talk enough about who is authorized to point out such a conflict. I think we are comfortable with -- to a certain extent, with the courts doing that, although the law journals are full of disputes about whether the courts should even talk about morality. But I don't know if we're talking, comfortable talking about it, at the level of the individual practitioner, what he or she should do, when faced with a conflict between law and morality. And I don't know that we've talked about what we should do when we face that conflict.

I mean, how could you resolve a conflict between law and morality? You could ignore it. You could finesse it, just sidestep it. You could redescribe it, so it goes away, or you could confront it head on and say, "I can't do this, it's -- it's immoral." But -- you know, which of those approaches you would take, to link back to our talk about character, is a matter of personal integrity. And as far as I can see, as a profession, we're not confronting these issues. We're not talking about them.

Now, I can't suggest to you this morning -- I mean, I don't have for you this morning -- the answers to those questions, as to how we should recognize a conflict between law and morality, or who gets to say that there is a conflict, and what he or she gets to do about that. What I'm saying to you this morning is that, I don't think our profession is even raising those questions. They have not -- we have not, as a group, worried about that.

Now, I don't want to seem -- I hope this does not sound too grim and melodramatic to make the point, but let me go ahead and say it: That one of the mysteries that historians and philosophers worry about is how the legal profession in Germany could have done what it did under Hitler? How could this have happened? A profession committed to professional standards, to ethical standards, how could this have happened? Could it have happened because the profession didn't confront this issue of what we would do, how we would recognize, how we would deal with a conflict between

law and morality?

That's the second gap I see in professional ethics, a gap pointed out by moral philosophy, by moral philosophy's talk about where law comes from and what gives it its authority, and a gap that moral philosophy might be helpful to -- to fill.

Now, these are the two holes I wanted to point out in professional ethics. So we don't talk enough about character, and we don't talk enough about the relationship between law and morality, and in particular, the possibility of a conflict between law and morality. But the silence of our professional ethics, the silence of our codes on these two issues, can't, I think, can't lead us to conclude that we don't have to answer these questions for ourselves. They can't lead us to conclude that we don't ultimately have to answer for the way we handle them. And I think we'd be better off if we talked about them, rather than just leaving them to chance and being silent about them.

That's it. That's what I think moral philosophy can tell us about legal ethics.

(Applause.)

JUDGE GREENE: Any questions, comments? Cut the comments. Any questions?

(Laughter.)

JUDGE GREENE: Okay. Hey Buddy, you know what?

COLONEL MYERS: What?

(Laughter.)

JUDGE GREENE: You're good.

COLONEL MYERS: Thank you. I'm sorry I'm so slow. I told you I was slow.

JUDGE GREENE: Charlie, on behalf of the Court and behalf of the conference, we'd like to give you a small token and our thanks for making us think.

COLONEL MYERS: Thank you, sir.

(Laughter.)

JUDGE GREENE: Ed Zimmermann expressed that there was a note for Paul Everest circulating. I have it here and if you want to put your signature to it, I'll leave it at the end of the table. The last time I saw Paul, he was doing quite well, and hopefully will have a full recovery. We're drawing near the end. I appreciate your attention very much.

At this time, I'd like to call on Judge Ken Kramer for closing remarks.

JUDGE KRAMER: Well, last night I told you that I was the only thing separating you from the food. The task that I have this morning is somewhat similar, but a little bit different. This morning, I'm the only thing separating you from your freedom, and perhaps equally or more importantly, your CLE credits. So I'm going to try to be very respectful of your time.

You're probably asking after such a great conference that we've had, why is he up here now? And the answer is, of course, that I'm going to be the successor to our very great and first Chief, Judge Nebeker. He has certainly left me with a high standard to meet.

The next question that I'm sure you're asking is, how did I get to be the successor of Chief Judge Nebeker? Well, as you know, age has its privilege. And to be exact, I'm five months and 11 days older than Judge Farley --

(Laughter.)

JUDGE KRAMER: -- who was appointed exactly at the same time as I was, some 11 years ago.

It's clear that judicial review is here to stay, and that's no small accomplishment. Speaking personally, I believe that judicial review has meant a lot to veterans. We have much better decisions, based upon much better evidence, and a much better process. But as Robert Frost said so eloquently, "We have miles to go before we sleep." Where will those miles take us?

Well, let me share with you just briefly my vision of just a few of our most important destination points. I think the time has come that veterans' Law should become a course of regular study in our nation's law schools, so that we can better prepare future lawyers, with an appreciation, understanding, and hopefully a desire to participate in veterans' Law.

Secondly, some believe that more has to be done to provide our Court with its own identity. There are many ways in which that can be accomplished, but I believe that one way would be a permanent home for the Court, in a courthouse that befits the significance of judicial review of veterans' cases.

And thirdly, I would point to, as has been done in some of our seminars, recent developments, which I believe suggest a need for a thorough, objective and open examination, as to the appropriate scope of judicial review for the Court.

I very much look forward to working with you on these and other important destination points. In doing so, I hope that there will be more interaction and communication among members of the Private Bar and veterans' organizations and their staffs, VA Counsel, and Court personnel, all of whom have a whole lot more in common, than not.

Each of you in this room, in your own unique way, is owed a great thanks for making judicial review a meaningful reality. My door is always open to you.

God bless the United States and this honorable Court. Thank you very much.

(Applause.)

JUDGE GREENE: Don't forget your evaluation forms. I hereby declare this conference adjourned.